CASE AND COMMENT

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The State as a Rate Maker

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EACH state of the Union must be a rate maker. That is a power incident to sovereignty. At the formation of the Union, authority over interstate commerce was conferred upon the Federal government, but dominion over state commerce was retained by each state; and the state's authority thereover is as complete as the Federal government's over interstate commerce. Each state is a sovereign with every attribute of sovereignty, save those by it delegated; and it must make transportation rates because of three of its duties, *viz.:* to control monopolies, to provide ways for the movement of men and merchandise, and to regulate common carriers.

Highways of Commerce.

Road building and upkeeping has been an incident of government since before the Romans. The Egyptians constructed the great commercial canal of Saty, which coupled the Nile with ocean waters; Cyrus of Persia established and made safe trade routes and post roads from the Arabian to the Black Sea; while the Romans were the world's greatest road builders until the American came. If those roads were made for military purposes, they served commerce better than they served the cohorts, and long after the last legionary had made his last march these highways were thoroughfares for traffic.

Many of the highways of ancient commerce were water ways, but in freeing those routes from riparian robbers, and that great intercontinental sea that washed the ancient world, from pirates, the Roman and his orient neighbors were doing the duties of government.

The tracks of trade in the middle ages were bad because the governments were bad. With a betterment of governmental conditions came a betterment of the means of communion and commerce. To the feudist of that dark time, "stranger" was synonymous with "enemy." The Crusades gave the first glimpse, and the Renaissance made full disclosure, of the beneficence of commerce; and the instruments then came as a matter of course. The King's highway grew longer and better, and the highwaymen fewer, year by year.

Road-Building Power.

True, our general government is peculiar,—unlike any other,—in that it is one of conferred and enumerated powers; the powers of other governments are inherent; but in the list of conferred powers are those given by the commerce, the post road, and the general welfare clauses; these give the road-building power and impose that duty. The Cumberland road, begun in 1806, and extending from Maryland to Illinois, was the first exercise of this power by the general government. The railroad is a highway. Its operator is a common carrier. The general govern-

ment might have built these highways, as it did the Great National Pike. It was performing this duty when it subsidized the Pacific lines. If a private corporation did the work, being clothed to that end with the power of eminent domain, the corporation became an agency of government. The powers of government can only be lawfully exercised for governmental purposes. Eminent domain is one of the highest of these powers. The railroad can only wield it as a servant of the government. If the corporation is to be a beneficiary of the power, it must be a bearer of its burdens, too. Powers are ever yoked with duties, and this maxim finds its highest exemplification in its government. As agents of the government, they are subject to its control.

Governmental Control.

But for eminent domain, the roads could not have been; and since they are creatures of government, they cannot be beyond the sway of their governmental creator. The fact that the interstate carrier is incorporated under the laws of some state does not change the relation of that carrier to the government whose commerce it serves; for though it is the state's power of eminent domain that is invoked, in such case, and too, the carrier is a citizen of that state, those facts do not change the truth,—that the state having conferred all its dominion over interstate commerce upon the Federal government, the carriers of that commerce, that are citizens of that state, are also placed within control of the general government in their interstate capacity; and such control as the state had over the interstate carrier citizen as resulted from that citizen's having exercised the state's power of eminent domain, is passed on to the general government so far as interstate commerce is concerned. In other words, the state having conferred control over interstate commerce upon Congress, the necessary control over the state-created instruments of that commerce inevitably went with it.

Monopolies.

The state must make rates, too, because these instruments of transportation are monopolies. Having their being, as they do only by the sanction and aid of government, and being absolute monopolies to the several communities served by them, they are within the sweep of governmental regulation. Lord Ellenborough said:

"But if for any purpose the public has a right to resort to his premises and make use of them, and he has a monopoly in them, if he will take the benefits of that monopoly, he must as an equivalent perform the duties attached to it on reasonable terms." (Allnut v. Inglis, 12 East, 527.)

The fact that we have state and national governments does not alter their respective duties and powers. Each must control monopolies within its own jurisdiction.

Common Carrier.

The state should regulate its common carriers. This has been the law of the Anglo-Saxon for more centuries than the railroads have known decades. True, the property of the railroad company is private, but it bears the impress of the public,—the King's broad arrow is on it all. Lord Hale, in his De Portibus Maris, said:

"For now the wharf, etc., are effected with public interest, and they cease to be *juris privati* only; as if a man set out a street in a new building on his land, it is no longer private interest, but is effected by a public interest."

And what the old law lord said four hundred years ago is true to-day.

So, as monopolist, as common carrier, and as government agent, the railroad owes direct obedience to the government; and within the limits of the Constitution, the railroad is subject to the government's will.

State and Nation.

Our dual form of government compels us to look to both state and nation for the whole of this power. How much of it belongs to each is a question with new interest since Judge Sanborn decided the Minnesota Rate Case. Judge Sanborn is one of our great judges; his lofty character, his endowments and erudition,

compel the respect of all lawyers; yet many of the most thoughtful will refuse to accept his reasoning in that case. He said in substance:

If a state-made rate causes an interstate carrier to change an interstate rate, the state rate is void. Result: A state rate is part of an interstate rate, so made by the carrier; it is excessive; the state reduces it; fearing loss of business, the carrier reduces the interstate rate; the Federal court holds the new state-made rate to be void; the state-made rate is eliminated; the old state rate is restored; it is still excessive; but the state cannot correct it, because to do so is to invade the field sacred to Congress; and the Federal commission cannot correct because the rate is a state rate, over which Congress has expressly declared the Interstate Commerce Commission shall exercise no control; and the people of that state must endure a wrong without remedy, put upon them by their own corporate creature. Such a conclusion is unthinkable. The Federal Constitution gives no warrant for it.

Construction of Commerce Clause.

What did the Constitution makers and adopters intend? The commerce clause reads that Congress has power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It is always wise to read a constitutional provision in connection with Amendments 9 and 10:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." (9th Amend.)

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (10th Amend.)

These are pretty broad hints not to construe powers out of the people and into the Constitution.

It is often well to learn of the atmosphere in which an instrument grew if you would know its meaning, to employ one of Judge Hook's metaphors. With a knowledge of the environments of the persons who created an instrument, we have much to guide us in determining what was in the minds of those persons when they wrought. The most casual student of the period of American history covering the creation and adoption of the Federal Constitution knows that there was then in the minds of the people fear of a strong centralized government. It was not only a British King, but a British Parliament, that had played the tyrant to the colonies, and it was not only a dictator and a King, but an American House of Commons, that the people feared might exercise improperly powers that might be given them. Who is so credulous as to believe that the Constitution would have ever been adopted if the commerce clause had read:

Authority is hereby conferred upon the Federal government to control foreign and interstate commerce, and to regulate and control state commerce, when it affects foreign or interstate commerce.

The conduct of the people, while yet of the same mind as when the Constitution was adopted, shows their ideas and purposes. Turnpikes and canals were built from state to state; wains and wagons, coaches, and canal boats knit the commonwealths together with the numberless threads of a mighty interstate traffic, and yet "no one supposed that the wagons of the country which were the vehicles of commerce, or the horses by which they were drawn, were subject to national regulation." (Baltimore & O. R. Co. v. Maryland, 21 Wall. 470, 22 L. ed. 683.)

The Supreme Court has said much on this subject.

But the fact that this question never came to that tribunal for thirty-five years after the Constitution was framed shows how completely wagon commerce was understood to be subject to state regulation only; while the frequent invocation of the commerce clause since railroads have been the movers of merchandise shows how they have revolutionized trade, and how the Constitution has been judicially expanded to meet changed conditions. It was not until 1824 that the Supreme Court was called upon to construe that clause, in Gibbons v. Ogden (9 Wheat. 1, 6 L. ed. 23), wherein Chief Justice Marshall said:

"The completely internal commerce of

a state, then, may be considered as reserved for the state itself." And that will, of course, be conceded by all.

State Rate Affecting Interstate Commerce.

The rub comes when it is claimed that the state regulation in some way affects interstate commerce. When does it affect commerce beyond the state? Every state rate has some effect upon some interstate rate. State and interstate commerce are so blended, the railroads serve both so simultaneously, that the imaginary state lines cannot prevent their interdependence. Now, Judge Sanborn says the courts are to determine when the effect of a state rate on interstate commerce is sufficiently direct to come within the inhibition of the commerce clause. One can readily see the confusion that must flow from this doctrine. Even judicial minds are bound to differ as to what state rate has such effect; and in substantially identical situations, in different jurisdictions, we would have different conclusions as to whether a state rate so directly affects national commerce as to be void. No, the safe rule is to call a state rate a state rate; because the line that separates the rate that has a direct effect beyond the state limits, and the one that does not, is so shadowy that attempting to follow it would result in landing us now on one side of the line and now on the other. And in this connection I will note that a marked vice in Judge Sanborn's reasoning results from his assuming that a railroad manager's determination is as dominant as a lawful mandate of government. Such an assumption leads to the queer conclusion that the sovereign power of a state to regulate its internal commerce may be subordinated to the opinion or caprice of an interstate railroad manager; and this conclusion means that not only are constitutional Amendments 9 and 10 to be eliminated, but that they are to be eliminated by one of the state's corporate creations. A state-made rate does not, in law, compel a change in any interstate rate until, at least, the general government says so.

In the Welton Case (91 U. S. 275, 23 L. ed. 347), the Supreme Court said:

"The inaction of Congress in prescribing rules to govern interstate commerce is equivalent to its declaration that such commerce shall be free from restrictions." This seems to indicate that, no matter how remotely a state rate may affect national commerce, if it affects it at all, it is void. But they righted themselves in 1877, when in the case of Peik v. Chicago & N. W. R. Co. (94 U. S. 164, 24 L. ed. 97), they said:

"As to the effect of the statute as a regulation of interstate commerce: The law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin, this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may directly affect those without."

And finally, in 1909, the Larabee Flour Mills Case (211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214) gives us the last word on this subject. Mr. Justice Brewer, in deciding the case, said:

"The roads are therefore engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress; in the latter, to that of the state; and, to enforce the proper relations between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved. Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. How the separateness of control is to be accomplished, it is unnecessary to determine. Its existence is recognized in the first section of the interstate commerce act of February 4th, 1887, as well as in that of June 29th, 1906. . . .

"Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and the delegation of that control to a commission,

necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed."

And the Federal government has expressly refused to take such action in the proviso clause of § 1 of the commerce act:

"The provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory, as aforesaid."

If Congress chooses to extend the power of the Interstate Commerce Commission, then this question will loom large indeed.

The conclusion must be that the state has given over to the Federal government dominion over interstate commerce only, and in the exercise of this conferred authority, the nation refuses to act upon state rates. Whether the Federal legislature or any Federal agencies can void a rate made by state authority, simply because it may result in an interstate rate being changed, we will not here say; but we will say that both the proviso clause of § 1 of the commerce act and the United States Supreme Court have declared that Congress refuses to attempt to do so; and that if the field of state rates can, in part, be occupied by the nation, the nation now refuses to occupy it; and that leaves the line of demarcation between state and interstate well defined; a rate that is purely state is within state dominion alone; the interstate rate knows but Federal control.

And there is no occasion for disturbing the present distribution of this power between state and nation; and with the question of that distribution as such, the courts have nothing to do.

Interference of Courts.

So long as the rates are neither unjustly low nor unlawfully discriminatory, the courts have no right to meddle in the matter. Rates are confiscatory when they do not provide for all the expenses of transportation and give a fair return upon a fair valuation of the investment. In passing, it might be remarked that it is absurd to contend that a state rate that is fair can become unlawfully low by being made a part of an interstate rate, which, of necessity, involves a longer haul, because it is recognized that the ton mile cost lessens as the haul lengthens. Within the limits of a fair return, the government has complete power to regulate rates. If the constitutional provision against the taking of property without just compensation or without due process of law be invaded, then the courts can interfere, and then only.

"The courts in clear cases ought not to hesitate to arrest the operation of confiscatory laws, but they ought to refrain from interfering in cases of any other kind." (Knoxville Water Company Case, 212 U. S. 1, c. 18, 53 L. ed. 382, 29 Sup. Ct. Rep. 148.)

Control of Carriers.

What is wise to be done in a local matter is best determined by local authority, and the state is primarily a local matter. Neither national nor state commissions have dealt harshly with the carriers. Because they were once absolutely without trammel, even wholesome restraint may gall; but the best types of railroad manager—those managers who recognize the true relation of carrier and government—make no complaint, because valid ground therefor does not exist.

Transportation Problems.

In conclusion: the railroad problem, like most big problems, has simplicity for its fundamental. Many, looking at the infinite complexity of transportational detail, conclude that the whole matter is beyond the common ken. The capillaries and the smaller blood vessels of the human body are almost infinite in their minuteness and number, but the principle of the circulation of the blood, proclaimed by Sir William Harvey, is easy to understand. Indeed, the problems of government must be simple, or popular government must fail; and the fact that in this country popular rule has passed beyond the stage of experiment is a complete answer to the suggestion that the people cannot sufficiently understand, to enable them to solve all the problems of government, including those of transportation.

The Nation as a Rate Maker

Further Steps in Federal Regulation of Railways

BY HON. BALTHASAR H. MEYER

Member of the Interstate Commerce Commission.

AT the outset I wish to say that I do not speak for the Interstate Commerce Commission, individually or collectively. The thoughts which I may express must be interpreted as my personal reflections regarding some of the vital questions connected with railway regulation. They are not uttered as final rules of action for myself acting officially or unofficially, and I must reserve the right to deviate from and modify whatever I may say to-day whenever, in the interest of justice and fairness, the facts and circumstances relating to a particular case require it. I do not want anyone to feel that his case is prejudiced if he should come before the Commission and present arguments at variance with some view which I may express.

Enlarging the Law.

Since the enactment, in 1887, of the original act to regulate commerce, a series of amendments and supplementary acts have been adopted, the most notable of which are the so-called Elkins act of 1903 and the amendments of 1906 and 1910. The original act did not measure up to the business which it was expected to regulate, and these successive statutes were attempts to adjust the law more closely to the railway business as it was understood to exist. The law has not yet caught up to the business. Not only with reference to Federal legislation, but, generally speaking, also with reference to state legislation, it may be said that the history of railway legislation in the United States shows the contemporaneous existence of two sets of inventors in rivalry with each other. The one is the set of railway legislative inventors striving to overtake the other set of railway managerial inventors. The latter have succeeded thus far in keeping the lead. In so far as it is possible to suggest a line of action in a general phrase, I should say that the greatest present need in the field of railway legislation is to make the law as big as the business. It should be given the best fit that conscientious and capable men can give it. The original law of 1887 was a veritable dwarf compared with the business, and this dwarf was relatively smaller in 1900 than in 1887. For years the law afforded little more than a process of nibbling at big things.

Regulation Essential.

It is pretty well understood now and realized quite generally that the railway business is essentially a public business, and that regulation rests upon the public factor in it. Regulation must extend to every single feature of the public aspects of the business. To the extent that it does not, it must necessarily be inadequate. Under private ownership and management such as exists in the United States, there is a large field of independent private action in which the public is not interested. This field is reserved exclusively to the companies, just as the other—the public field—must be open, without reservation, to interference in behalf of the public. Because of the many changes which affect the railway business in its relation to the public interest, what is private to-day may become public to-morrow.

Rates and Service.

No matter where we begin in a discussion of what people call the railway problem, we soon touch the question of rates and service. In these two things the public is directly interested, as well as everything that is affected by the rate and by the service. If a certain standard of suburban service on steam or electric lines to-day causes the shaping of communal growth, and the location of population, the establishment of industries, the creation of values, etc., should there not be some authority which might, if necessary, interfere in case this service is changed in a manner to affect adversely these people, industries, and land values? When traffic men confer with managers of prospective manufacturing enterprises regarding the establishment of freight rates, it is common to take into consideration the cost of the raw material for the proposed new enterprise, and to compare it with the cost of raw material to other manufacturers with whom the new manufacturer will have to compete. Shall a commission charged with the duty of administering a state or Federal law be foreclosed

from bringing within the horizon of its consciousness similar considerations in adjudicating controversies arising out of rate and service situations? In establishing rates on coal, for instance, I understand that traffic men are quite accustomed to consider the physical characteristics of the coal property, the methods of mining, and wages paid to the miners. Shall commissions have the lawful right to consider these facts, and to give them proper weight, in arriving at a decision regarding the rate on coal? Again, traffic men consider the profits in an industry and the relative profits in competing industries. In establishing rates for the transportation of the products of those industries, shall commissions have the lawful right to take cognizance of these things and give them proper weight? In other words shall railway commissions, state and Federal, be authorized to consider profits, wages, the standard of living, prices charged to the public, and all the other conditions and circumstances which affect an industry and the lives of the men who are dependent upon or associated with that industry?

Transit Rates.

So-called transit rates have been established in all parts of the country upon a variety of commodities. It is immaterial for present purposes to inquire into the history of these rates, or to discuss their merits and defects. The fact is, they exist and have existed for years upon grain, grain products, logs, lumber, cotton, cattle, and a variety of other raw materials and intermediate products. It appears to be more or less of a tradition in traffic circles to regard transit rates as privileges which a railway can extend to one community and deny to the other, which it may make wholly inclusive or partially inclusive, which it may establish for short or for long periods of time, and which it may abrogate whenever it sees fit. Should not regulatory statutes expressly confer full and complete jurisdiction upon commissions to control transit rates of any kind whatsoever, under all circumstances and conditions, to establish them, to annul them, to modify them? The law as interpreted in the past is not clear upon this point. Should it not be made clear?

Percentage Bases.

For more than thirty years there has existed in Trunk Line territory what are known as percentage bases for east-bound class traffic. It is well known that the rate from Chicago to New York on the different classes is used as the basis, expressed as 100 per cent. The entire Trunk Line area is partitioned into different groups, each of which is known by its respective percentage. Every point in the 100 per cent group takes the Chicago-New York rate. Every point in the 110 per cent group takes 110 per cent of the Chicago-New York rate. Every point in the 96 per cent group takes 96 per cent of the Chicago-New York rate, and so on through the entire list of percentage groups. More than this, for certain purposes these primary groups are consolidated into secondary groups, and all the points within the consolidated group take their respective percentages to particular destinations.

Discrimination under Compelled Rates.

The basal rate between Chicago and New York has always been regarded as a highly competition, automatically affects the corresponding change in the rates from all the difrespect to water ways. During the season of open navigation, the rates upon the Great Lakes are said to be controlling. Any change in the basal rate, whether due to rail or water competition, automatically affects the corresponding change in the rates from all the different percentage groups. It is obvious that all of these percentage rates are dependent upon what are known as water compelled rates. There are hundreds of points in the United States between which the rate is compelled by water or water and rail competition, in exactly the same sense that it is compelled between Chicago and New York. When controversies arise in connection with such rates, shall commissions be foreclosed from establishing relations, or from establishing, through administrative orders, a relation among such rates similar to the relationship which the carriers have voluntarily established and maintained in official classification territory; or shall it be said that the carriers may do this kind of thing if they see fit to do it, but that no administrative authority acting for state or Federal government shall have power to do so? Shall it be a sufficient defense, for even the most extraordinary discrimination between the terminal and the intermediate points, to say that the terminal rate is compelled, and that therefore no comparison can be made between it and the intermediate rate? A few days ago my attention was called to a terminal rate of 11 cents, as compared with an intermediate rate of 55 cents. The 55 cents intermediate rate greatly exceeded the terminal rate plus the local rate back. Shall commissions be refrained from asking whether such adjustments create unjust discriminations, and shall they be prevented from issuing orders which will abolish such discriminations and establish a more just relation among rates? With respect to terminal and intermediate rates, in many instances, the question is almost exclusively one of relationship, and not one of absolute levels. If the law does not now clearly vest in administrative authorities power to make orders establishing proper relations among all rates, whether terminal or intermediate or rates affected by them, should it not be amended to accomplish that end? Can justice be done in cases of that kind unless the law is so amended, assuming it does not now grant such power?

Power to Fix Minimum Rates.

The original law of 1887 was construed by

the first Interstate Commerce Commission as granting the power to fix rates after the existing rate had been duly found to be unlawful. Decisions of the Supreme Court of the United States in 1897 and 1900 made it clear that the law as it then stood denied the Commission the power to establish rates for the future. In 1906, the law was amended so as to give the Commission power to establish a maximum rate. That is the law now. The only rate which the Commission can lawfully establish to-day is the rate which cannot be exceeded. Carriers may drop below it. I understand that this maximum rate provision of the law rests partly upon the assumption that the carriers will compete below the level of the maximum, and that to grant the Commission power to establish absolute and minimum rates would deprive the public of the benefits of competition. This view has been shown so often to be fallacious and contrary to experience, that I shall not take time in this connection to discuss it. I assume that the public is fairly well informed with respect to the limitations of railway competition. Now, the establishment of a maximum rate enables the Commission to meet the great majority of cases, so far as the rate itself is concerned, apart from certain considerations which enter into the rate. But every now and then cases arise in which the want of the power to establish a minimum rate or a specific rate makes it impossible to remedy a situation shown to be unjust. It has been argued frequently, and we may well admit the argument to be substantially sound, that a carrier may transport commodities under certain conditions at an extremely low rate, provided the rate is not so low as to impose an undue burden upon other classes of traffic. Let us assume that in such a case a rate of 20 cents would be justifiable, but that a rate of 19 cents would no longer cover the out of pocket costs. If, now, one carrier should see fit to cut the rate to, say, 17 or 18 cents, between certain competitive points, other carriers would be obliged to do likewise, or withdraw from the business. Under the present assumption of fact the 17 or 18 cent rate does not cover the out of pocket cost, and the movement of traffic under the reduced rate imposes an undue burden upon other classes of traffic. Should not commissions have the power to step in on their own initiative, or on complaint, and compel all the carriers participating in the business between the given points to charge not less than 20 cents?

In a few years we hope the Panama canal will be busy with ships plying between the oceans. Suppose one of our transcontinental lines should see fit to cut its rates to an excessively low level, would not all the others be compelled, either to make the same cut or to withdraw from the business? Under the present law, this low rate, once having been established, cannot be restored to its former level after actual water competition has been eliminated. Assuming that water competition should be eliminated, does the public get all the protection it needs in the prohibition which prevents the re-establishment of the original rate? Obviously not, because that procedure may result in permanently imposing upon other classes of traffic an undue burden, and it would be impossible through public authority to lighten this burden if the total return to the carriers could be shown to be not unreasonably high. Without entering upon an analysis of the collateral questions suggested by this illustration, does not the mere statement of this possible situation carry the conviction that there should be vested in the Interstate Commerce Commission power to establish a minimum rate as well as a maximum; and, I should add, as well as an absolute rate anywhere within the zone of reasonableness bounded by the maximum and minimum lines?

Physical Valuation of Properties of Railways.

As its annual reports to Congress will show, the Interstate Commerce Commission has repeatedly recommended that it be authorized to make a valuation of the physical properties of the railways in the United States, and that an appropriation be made for that purpose. For one reason or another, the appropriation has never been made, although the law in its present form probably gives the Commission the legal power to undertake the work. In the case of a piece of work of that kind, however, the power unaccompanied by the necessary appropriation is quite futile. There has always existed a great deal of opposition to a physical valuation. Apparently there has been some change in sentiment and within the last twelve months several prominent railway men have expressed it as their opinion that such a valuation when made would be useful. The great majority of railway men are probably still opposed to a physical valuation. One source of the opposition seems to rest upon the erroneous assumption that the value of the physical properties will, under all circumstances, be declared to be the value for rate making purposes. I know of no one who has thought himself into this question at all who has ever taken such a position, publicly or privately. It has always seemed strange to me that men who insist, and insist properly and justly, that they are entitled to a fair return on the fair value of their property, should oppose the taking of one of the most important steps in the determination of this fair value. The value of the physical property is one of the factors entering into the fair value of the property. The term "fair value" is inclusive, and embraces every fact, circumstance, and condition having a bearing upon the value of the property. The value of the physical property is, perhaps, the most important single element, but all other elements must be considered. Who can establish the fair value of property without knowing and considering the cost of reproduction new, for instance, the original cost where this is obtainable, the value of

the property in its present condition, the financial history of the property, its gross and net revenues, its fixed charges, dividends, amounts charged and chargeable to depreciation, contingencies, reserves, renewals, extensions, and the host of things which affect the judgment regarding the value? In states where the physical property of railways has been valued, it has been customary to make at least a double-column valuation, the one representing the cost of reproduction new, and the other representing the cost of reproduction new less depreciation, or the value of the property in its present condition. The different parts of the physical property are valued separately, such as right of way and station grounds, bridges, culverts, trestles, ties, rails, etc. In connection with the valuation of right of way and station grounds there is encountered the question of the so-called unearned increment. This is a large question with far-reaching consequences, both legal and practical. Within the last few weeks it was argued before the Commission, for instance, that the appreciation in the value of land devoted to the terminal uses of a railway, resulting from harbor improvements made at the expense of the Federal government, should not be considered in estimating the return which present rates have yielded upon such terminal properties. This raises the question whether a railway company, like individuals, shall participate in the increased values resulting from the general development of the community. Shall railways have the benefit of the rising land values resulting from the development of farms in the territory which they serve, and shall station grounds in cities be valued at a higher figure because the real estate surrounding them has risen in value? In estimating the rate of return to which a railway company is entitled, shall the same rate of return be calculated upon real property, especially real estate devoted to terminal uses, that is, and should be, accorded to all other parts of the investment in railway property? For example, if 10 per cent shall be assumed to be a fair commercial rate of return on a commercial enterprise in the city of New York, and 3 per cent the average rate on first-class real estate, in estimating the returns to which the Pennsylvania and the New York Central systems are entitled on their magnificent terminal properties in this city, shall the calculation be made by applying 10 per cent to the value of the whole of these terminal properties, or, say, 3 per cent on the value of the real estate and 10 per cent on the value of all the other property attached to the real estate? These figures are, of course, merely illustrative of a principle, and not the expression of a fact.

Valuation of Outstanding Securities.

Having arrived at the value of the physical properties of a carrier, it will be necessary to investigate the outstanding securities of that carrier as another step towards a fair valuation. Some railways are under-capitalized, some are capitalized at a proper figure, and some are excessively capitalized. Whatever public feeling there exists in this country with respect to the question of capitalization is probably the result of knowledge relating to the latter, or over-capitalized class. The railroad securities commission, appointed by the President pursuant to an act of Congress to investigate matters relating to the issuance of stocks and bonds by interstate railway corporations, was told many times by eminent men in the city of New York that the outstanding securities of a railway really had nothing to do with its rates. But if these same eminent men could sit with courts and commissions throughout the country, they would soon become convinced that however correct their judgment might be with respect to the theory of the thing, in actual practice outstanding securities do have, and have had, an important influence upon rates and service. What railway manager is there who does not, consciously, or unconsciously, strive to his utmost to show a net return from operation sufficient to pay interest on whatever bonds are outstanding, and dividends on whatever stock is outstanding, even though the par value of the bonds alone greatly exceed the value of the physical properties, and possibly also the amount of money which ever found its way into those properties? I recall the instance of a property upon which the outstanding bonds amounted to over $58,000 per mile and the stock to about $40,000 per mile, while the whole property could be reproduced to-day, new, at present prices, for probably not to exceed $30,000 per mile. These bonds were sold years ago at 92. This property has changed hands several times, and the man who sold the bonds at 92 possibly got the "velvet" for which the present management is sweating. It is instances like these that explain the intense feeling which exists on the part of the public in many localities. What are the equities in a situation of that kind, and what is the fair value of such a property for the purpose of settling rate and service questions?

Regulation of Issuance of Securities.

The railroad securities commission not long ago issued a report in which it made certain recommendations. One of the purposes it had in view was to prevent the reckless or fraudulent issuance of securities in the future. The securities issued in the past must be dealt with in the light of the legal and economic conditions under which they were issued, and in the light of the present condition of the property upon which they rest. Present and future issues of securities should be regulated along the lines suggested in the report of the securities commission, unless something better can be suggested. Because of the public character of the railway business, and the unmistakable tendency of appealing to outstanding bonds and stocks as a justification for a certain level of charges or a certain quality of service, it becomes a matter of great public importance that henceforth capital issues shall be restricted to the necessary and proper financial

needs of the company issuing them. It is a misfortune that this was not done in the past.

Other members of the securities commission may have had other motives in view. Our report was unanimous, and so far as I know all the other members were actuated and guided by much the same considerations that influenced me. But speaking only for myself, and without suggesting that what I may say expresses the individual views of the other members, I may state that there were only two really important lines of action to be considered. One resting upon the principle of administrative investigation and authorization of proposed capital issues before the act, and the other upon investigation and publicity subsequent to the act. As between these two principles the latter was our unanimous choice. Viewing the country as a whole, and having regard to railway construction and operation under the varying conditions prevailing in different sections, it was quite impossible to urge with any degree of confidence and assurance of success the adoption of the first-named principle. Entirely aside from the possibility of necessary, but nevertheless annoying or vexatious, delays, the granting of authority for specific issues of all stocks and bonds for all the railways operating in the United States would inevitably be associated with the idea of government guaranty, The public would be led to believe, and scores of enterprising promoters would encourage the belief, that all stocks and bonds issued under the express authorization, in each case by a Federal administrative authority, such as the Interstate Commerce Commission, bore upon them the stamp of genuineness and stability in value. The public would be led to believe that these engraved pieces of paper represented substance at least to the extent of their face value. Now what the public is interested in, from the point of view of the regulation of rates and service, is that every dollar which is charged to a property, and becomes a burden upon it, shall be expended upon, and devoted to, that property. Reasonable rates and reasonably adequate service should be measured only by the actual investment in the property, to the extent to which this investment is in a particular case the measure of the rate and the service. Of what interest is it to the public if certain men prefer to represent one dollar of actual money by a beautifully engraved piece of paper bearing upon its face the mark of $1, or $5, or $10? The public would have the greatest interest in preventing the issuance of any piece of paper purporting to represent on its face more than $1, if this paper were to be construed as the measure of the value of the property devoted to the public use; but under a proper system of valuation, accounting, and rate and service regulation, the issuance of securities becomes largely a question of public morals. Under the plan proposed by the securities commission, the Interstate Commerce Commission would make an investigation with a view of determining whether that dollar had actually gone into the property; whether it had been expended with reasonable economy and efficiency, or whether only a part of that dollar had gone into the property. Under the type of act recommended by the securities commission, anyone found guilty of deflecting a part of that dollar from its proper use could be prosecuted and punished. I believe that if Congress will adopt a law embodying the principles urged by the securities commission, a tremendous step forward will be taken. If experience should show the prudence and wisdom of subsequently adopting the other method, that could be done at any time; but it appears to me imperative that something should be done now, and I know of nothing better than that which the securities commission has recommended.

Initial Company Responsibility.

In all our best recent statutes, state and Federal, relating to the regulation of railways, the fundamental principle of initial company responsibility has been adhered to. In the first instance every public utility is responsible to its patrons for providing reasonably adequate service at reasonable rates. It is only when the service becomes inadequate, when the rates are unreasonable or unduly preferential or discriminatory, that the power of the state and Federal governments may be exercised in the correction of these improprieties or evils. The initial responsibility, as I have said, rests with the utility. And there it should rest, placing it upon the defensive to justify its rates and service whenever a proceeding is brought in accordance with the statute. The arm of the state thus wields the power of authority only as an agency of correction, and not of initial action. The existence of this type of regulating statutes, so far as I know, had absolutely no influence in shaping the conclusions of the securities commission, but it is to be noted that the rule of action recommended by the securities commission is entirely in accord with the principle pervading other regulating statutes. This is a mere coincidence. It results from a correct analysis of the fundamental factors involved in the business of common carriers. If a rule of action at variance with this general principle of initial responsibility of railway legislation would promise better results than some other, I should unhesitatingly adopt it. I believe all my colleagues on the securities commission would have done the same thing. We adopted, however, the principle of the initial responsibility of the carriers in connection with the issuance of their bonds and stocks, because on the whole it seemed to us to be by far the most promising. If the law suggested by the securities commission should be enacted, the Interstate Commerce Commission could step in at any time, anywhere, and place the issuing companies upon the defensive to justify their action and to prosecute them whenever they have violated the law.

Operating Statistics.

Work has been in progress for some time, aiming at the compilation of operating statistics which will make it possible to arrive at more correct guides of efficiency and economy its railroad commission. This complaint was, said in recent times about efficiency. After all, with respect to the railway business it makes little difference whether we speak of efficiency accounting, economy accounting, or cost accounting. They come pretty much to the same thing. What is wanted is a system of statistics that will reflect the business in the fullest detail possible. It appears to me to be important for every management to know from which classes of traffic it derives its greatest revenues,—which business is most profitable and which the least. How can a management know these things without knowing what it costs to conduct the business? In common with many others I have long believed that cost accounting can be made immensely valuable in its application to the railway business. Several of the great railway companies in the United States have undertaken extensive statistical analyses right along these lines, and I am in hopes that in the not distant future every railway system of consequence will do the same.

Finality of Decree of Commission.

Is there any field within which the jurisdiction of the Interstate Commerce Commission is complete and its decree final? This question cannot be answered with any degree of confidence under the state of the law as it exists to-day. In the case of State ex rel. Minneapolis, St. P. & Ste. M. R. Co. v. Railroad Commission, 137 Wis. 80, 117 N. W. 846, the supreme court of Wisconsin said:

"With reference to the order appealed from, were this court sitting as a railroad commission it would not have made the order in question, because, while the order is no doubt of great convenience to the dwellers about Dwight, their interest seems to us to be overbalanced by the larger interest of the general public. But this is far from saying that we find the order to be unreasonable, or that it appears to us by clear and satisfactory evidence that the order is unreasonable. Competent and reasonable men might differ with regard to the propriety or with regard to the justice and reasonableness of the order before the court. It neither affects the interests of the general public nor the interest of the railroad to any great extent. It is undoubtedly within the power of the railroad commission to make such an order. No errors of law appear to have been committed."

In other words, the supreme court of Wisconsin took the view that, within certain confines, the judgment of the Commission was conclusive and final. Even though, in the view of the court, such conclusion of the Commission might appear to be erroneous, it is nevertheless final. No one will venture to interpret this utterance of the court to mean that it will connive at injustice. Far otherwise. A wrong cannot be made a right even though it should receive legal sanction. I am unwilling to tolerate for a moment the shadow of a suggestion that I want any erroneous findings of a commission to become improperly entrenched behind a statute; but I do know and realize that unless the judgment of the Commission is made final within proper limitations the ends of justice will be frequently defeated. As the Federal law now stands, an order of the Interstate Commerce Commission establishing a rate for the future remains in effect for a period not to exceed two years. How easy it is to whittle away this brief period in court proceedings. Every commission is bound to make mistakes. If these mistakes occur within the field which should be reserved for final judgment of the Commission, it is unfortunate. Such misfortunes cannot be avoided, but their evil effects can be overcome by prompt correction by the Commission itself. There exists ample facility for the modification or revocation of orders which can be shown to be improper and unjust.

Province of Courts and Commission.

The courts must necessarily pass upon questions of confiscation, unlawful procedure, and other questions affecting the construction of a statute. This field belongs peculiarly to the courts, just as the other should belong to the Commission.

Within the last few months the Interstate Commerce Commission heard arguments on a complaint brought by the state of Louisiana pursuant to a special act of its legislature. It was represented by its attorney-general and its railroad commission. This complaint was, in substance, an appeal to the Interstate Commerce Commission to protect an important Louisiana city and its affiliated interests against the alleged arbitrary and unlawful action of the authorities of the state of Texas. Irrespective of the merits of this controversy, complaints of similar import suggest the inconsistencies which are bound to arise when different authorities are attempting to deal with the same thing. These inconsistencies have been some times referred to as conflicts. I do not believe the word "conflict" properly describes the situation. There are inconsistencies and maladjustments which neither state nor Federal authorities alone can now reach under the law as many would interpret it, although the final interpretation has not yet been rendered.

I realize that the question raised by the Louisiana petition is, in some of its aspects, a delicate one, and, lest my utterances be attributed to desires arising out of my present position as a member of the Interstate Commerce Commission, I will refrain from saying more than what I said before I became a member of the Interstate Commerce Commission, and while I was a member of a state commission. Publicly and privately I had frequently expressed the ideas contained in the following quotation. My experience on the Interstate Commerce Commission has strengthened me in those views.

"Turning now to the idea of home rule as applied to state control of interstate utilities in its relation to Federal control, it may be well to remember that the doctrine of states' rights has never been confined to some one section of the United States. Our historians have amply demonstrated that the idea of state sovereignty has been in circulation in all parts of the country during the entire period of our national existence. Within the last five years, states separated from one another as far as Washington and Florida, Maine and Texas, and California, have manifested objections to the exercise of regulatory functions by the Federal government within their respective domains, on the ground that the exercise of such functions was an invasion of the inherent rights of the states. When it is proposed to adopt one uniform classification of freight for the entire country, the voice of many a state is at once raised on the ground that each state should reserve the right to make such classification in any manner it sees fit. When it is proposed to promulgate uniform rules governing the free time for loading and unloading cars, many states protest that this is something entirely and exclusively within their jurisdiction, and that the Federal government should have nothing to do with it. When it is proposed to have the Federal government investigate accidents, and pursue a more vigorous policy with respect to the promotion of safety in connection with the operation of our railways, many of the states look upon the suggestion as an invitation to surrender their sovereign powers.

"Now, the United States is a nation. This nation is a commercial unit, and not an aggregate of units. The great interstate railways, telegraphs, and telephones are national in scope and character. There cannot well be forty and five masters for these great instrumentalities of commerce, each master pursuing his own ideals or traditions and each administering its specific type of treatment. Anyone at all familiar with the relation of states to interstate railways knows the many complications which arise in the attempt to limit investigations or action to state lines. The information which is necessary in order to act intelligently with respect to the business of one of these carriers in a single state is generally equally adequate for similar action applicable to all the states within which the railway lies. In fact, one of the greatest factors of uncertainty in all questions relating to state and interstate business emanates from the attempt to segregate state and interstate business, and to take action with reference to one or the other exclusively. If every interstate carrier could be treated as a unit, state lines ignored, and questions arising out of rates and service dealt with as single issues affecting the relation of such carriers to the people in the territory in question without regard to state lines, a much simpler and generally also much more satisfactory and just result could be arrived at. While there may be danger in delegating so much power to a central Federal authority, if this Federal authority is properly articulated with local and intermediate authorities, there is no reason why the interests of each state should not be subserved as well by a system like this, so far as purely local matters are concerned, and infinitely better so far as all other matters are concerned. It should be relatively immaterial whether the administrative authority is appointed directly by the authorities of the state, or by the Federal government, provided that the work which such authorities are appointed to do is properly done. A well-articulated system of local, intermediate, and central commissions could readily maintain close relations with the people of the various states, and understand their interests and necessities as well as any local commission possibly can, and at the same time work in much closer harmony with those authorities which have to do with areas greater than the states, than is now possible."

"If the railroad as an incident of commerce can only be dealt with justly and efficiently by a single authority the Federal government may assert and maintain its exclusive jurisdiction. . Regulation is now inefficient because divided. If the Federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just."—Hon. Charles F. Amidon.

The International Regulation of Ocean Travel

BY EVERETT P. WHEELER

Of The New York Bar

THE Senate of the United States has just adopted the following resolution: "*Resolved,* That the President of the United States be, and he is hereby, advised that the Senate would favor treaties with England, France, Germany, and other maritime governments, to regulate the course and speed of all vessels engaged in the carrying of passengers at sea, to determine the number of lifeboats, rafts, searchlights, and wireless apparatus to be carried by such vessels, and to assure the use of such other equipment as shall be adequate to secure the safety of such vessels, passengers, and crews."

This resolution naturally attracts the attention of those interested in the study of International Law.

Uniform Treaties and Laws.

So far as these treaties deal with subjects of general importance and involve interests common to all nations, it is very desirable that they should be uniform. This uniformity can best be obtained by conference between representatives of different maritime nations, at which the delegates shall have ample opportunity to consider the subject in all its bearings, and then report their conclusion for ratification by the powers that sent them. Many such conferences, which have sometimes been called congresses, have been held. The one that is most in the public eve at present is the conference at The Hague, in 1899, which first made provision for the establishment of an international court of arbitration.

But long before this conference was held, there had been other conferences in reference to maritime matters which had led to greater uniformity in maritime law. As the commerce between different countries increased, the number and size of vessels trading between them increased in a corresponding ratio. The speed and power of ocean steamers have increased in equal ratio, and these mighty vessels have almost entirely displaced the sailing vessels which carried almost all ocean-bound commerce down to the year 1850.

Lights and Signals.

The risk of collision had increased in a corresponding ratio. Certain usages in reference to lights and signals had grown up in different countries. It is to the honor of the state of New York that one of the first acts of legislation prescribing lights and signals for the purpose of avoiding collision was adopted by that state in the year 1829. This act provided for the range lights, the forward white light lower, the after white light higher, which were required on all the waters of the state of New York for many years, and were finally adopted by the international maritime conference of 1889. Before that time, and in or about the year 1861, many maritime nations had regulated the lights and signals, and precautions to be observed by ocean-bound vessels and these by common consent had become the law of the sea.[1] But experience showed that these regulations were in some respects deficient, and the

[1] The Scotia, 14 Wall. 170, 20 L. ed. 822.

construction put upon them by the courts of different countries was to some extent diverse. Accordingly, by agreement of the great maritime nations, an international maritime conference was held at Washington in the year 1889. It revised the rules of navigation and the requirements as to lights and signals. The international rules as recommended by them were adopted by statute or by executive decree in all the principal maritime nations, and have become the law of the sea from that time to the present.

Ocean Lanes.

This conference also dealt with the subject of ocean lanes, and with that of life-saving systems and devices. Commodore Maury, before the Civil War, had made a careful study of the ocean currents on the route between New York and Liverpool under the climatic conditions which prevailed at different seasons of the year, and had recommended certain routes to be observed by ocean steamers plying between the United States, on one side, and British, French, and German ports, on the other side, of the Atlantic. The great Civil War distracted attention from these recommendations. The subject was again taken up by Thomas Henry Ismay, who was one of the founders of the White Star Line, in a letter to the British Board of Trade on the 1st of January, 1876. In this letter he called the attention of the Board of Trade to these recommendations of Commodore Maury, recommended them strongly for adoption as means of preventing collisions and avoiding danger from ice, and declared that he had required the steamers of the White Star Line, sailing between New York and Liverpool, to observe them. This recommendation was again taken up by the firm of Ismay, Imrie & Company, of which Mr. Ismay had been the senior partner, in a communication to the British Board of Trade, dated December 12, 1889. The result has been that these lanes have been adopted by all the trans-Atlantic lines.[2]

At the conference of 1889 the subject of the enforcement of the agreement as to these ocean lanes came under consideration, and reference was made to the discussion which had taken place before the United States Naval Institute at Annapolis. In the course of this discussion, Ensign Everett Hayden made the following statement:[3]

"The mails are given to the fastest vessels. One steamer may take a safer route, traverse a slightly longer distance, and lose the mails. This very thing happened last year, when the Werra was beaten a few hours by the Servia, and Captain Bussuis complained that he had followed the route recommended and lost the mail in consequence. This question should therefore be carefully considered and postal regulations framed accordingly."

This statement of Mr. Hayden's expresses very clearly one intrinsic difficulty which had been perceived at the time of the conference, that is to say, the want of a sanction to any voluntary agreement that might be entered into between the steamship companies. It also points out very clearly the disposition of the several governments to encourage speed in the ocean transit, even at the expense of safety. It is obvious that any effective regulation of this subject could only be secured by international agreement.

Life-Saving Devices.

The next subject that was dealt with by this conference of 1889 was that of life-saving systems and devices. The report of the committee on that subject is in vol. 3 of the Proceedings, p. 182. This contains a report to the British Board of Trade of a commission which had been appointed by the Crown to consider the subject of life-saving appliances. The chairman of this commission was Thomas Henry Ismay. May I stop for a moment to say that I have known many men who were prominent in the commercial world. I have never known one of keener and more comprehensive insight, more liberal views, and more resolute determination to achieve the best results for the public than the elder Mr. Ismay.

The report of this commission was adopted by the British Board of Trade.

[2] Proceedings, International Maritime Conference, 1889, Vol. 3, pp. 269, 270, 277.

[3] Ibid, p. 278.

The principle of these rules was approved by the conference [4] and it recommended: "That the several governments adopt measures to secure compliance with this principle in regard to such boats and appliances for vessels of 150 tons and upwards, gross tonnage."

Unfortunately the several governments did not adopt these recommendations. A great diversity came to prevail in the equipment of ocean steamers belonging to different countries. Some nations were exacting, some were lax. The result was an unfair discrimination against the vessels of those countries which had adopted more stringent regulations.

Salvage.

Another subject that has been considered at the third international conference on maritime law is that of salvage. The ratification of the salvage treaty was consented to by the Senate January 18, 1912.[5]

But unfortunately this conference did not go far enough in reference to the important subject of compensation for saving life at sea. By the ancient maritime law, salvage compensation for the saving of life at sea, unconnected with the saving of property, was not allowed. This is still, I regret to say, the law of the United States, although it is true that our courts will grant more liberal compensation for the saving of property when it is accompanied by the saving of life. This was so held by Judge Ware in The Emblem [6] in 1840, and by Judge Benedict in The George W. Clyde,[7] in 1897.

The case of the Emblem is a remarkable illustration of the growth of the spirit of humanity during the last sixty years. The Emblem was a schooner that was dismasted and thrown on her beam ends in a storm. She drifted for five days, was passed by twenty-three vessels, no one of which went to her relief. Finally one vessel did succor her. Alas! all her crew died of exposure. The captain's wife alone survived.

The British Parliament made some provision by statute for the amendment of the law of salvage in this particular. The first enactment proved inadequate. The British merchant shipping act of 1894 [8] authorized the court to award salvage compensation for saving life from a foreign vessel, if "the services are rendered wholly or in part within British waters," and for saving life from a British vessel wherever the services were rendered. If it had not been for this act, the Carpathia would have no right to compensation for saving the lives of the shipwrecked survivors of the Titanic.

That great admiralty lawyer, Sir Francis Jeune, held in The Pacific [9] that a British vessel was entitled to compensation for saving the passengers and crew of a Norwegian ship that had been wrecked on the high seas, on the ground that they were brought into England by the salvor. The British Parliament did not think itself justified in extending to foreign vessels the liberal rule it applied to British ships, unless the service was partly rendered on British waters.

It is reserved for international agreement to extend this beneficent principle to the commerce of all nations.

From paper read before American Society of International Law, April 25th, 1912.

[4] Ibid, vol. 2, pp. 1091, 1093.
[5] The text of the Convention is in Vol. 4, Am. Journal Int. Law Supp. p. 126.
[6] 2 Ware, 68.
[7] 80 Fed. 157.
[8] Section 544, subs. 1.
[9] [1898] P. 170, 67 L. J. Prob. N. S. 65, 79 L. T. N. S. 125, 46 Week. Rep. 686, 8 Asp. Mar. L. Cas. 422.

The Present Federal Law of Damages for Death by Negligence at Sea

BY GEORGE WHITELOCK

Of the Baltimore Bar; Secretary of American Bar Association

[Ed. Note:—The legal questions presented by the disaster to the "Titanic" render Mr. Whitelock's paper very opportune. It should also be stated that the Maritime Law Association of America at its annual meeting held in New York city on Friday May 3d, 1912, approved a revision of the death statute heretofore pending in Congress. A report of the revision was submitted by FitzHenry Smith, Jr., of Boston, John M. Woolsey of New York city, and George Whitelock of Baltimore; and adopted after some emendation. The Association authorized its committee to urge the substitution of the revision thus approved for the bill heretofore advocated.]

THREE proposed reforms in admiralty have recently received the attention of the Congress of the United States. The bills, introduced at the December session, 1909, are respectively entitled as follows, *viz.:* (1) A bill relating to liens on vessels for repairs, supplies, or other necessaries; (2) A bill to permit suits against the United States for damages caused by vessels owned or operated by the United States; (3) A bill to authorize the maintenance of actions for negligence causing death in maritime cases.

The first of these acts, relating to liens on vessels, became the law of the United States on June 23d, 1910, when it received the Executive signature. The aim of this measure is to establish uniformity throughout the country, and to simplify the law by placing foreign and domestic ships on the same footing as to liens for necessaries, by doing away with the presumption that the owner alone, and not the vessel, is credited in the home port, or in a foreign port when the owner is present. An artificial distinction, first introduced into the maritime law of America by Mr. Justice Story's decision in 1819, and since steadily maintained by the Supreme Court, has thus been abolished by salutary legislation, and the long existing confusion from enforcing varying state statutes by procedure in the Federal courts in admiralty has been at last relieved by congressional enactment.

On several occasions special acts have been passed by Congress, permitting owners of particular vessels to sue the United States in specified cases of collision. The second bill above mentioned is intended to provide a remedy generally in such instances. To quote the language of an able practitioner in admiralty, the bill aims to establish a standard of national honesty as to certain governmental torts, similar to that established by the court of claims and Tucker acts in cases arising out of contract, and to correct an existing condition of grave injustice. As the law now stands, if a government vessel negligently collides with and wholly destroys the ship of a private owner, the latter is without remedy as a matter of right. The bill which proposes to reform this unfortunate condition of our Federal jurisprudence is still pending in the congressional committee, and it is earnestly hoped that the act will pass.

The right to recover death damages in admiralty, which the third bill proposes to confer, is the special subject of this paper. We proceed to consider the law of this topic in the Federal tribunals.

The Supreme Court of the United States decided at its October term, 1907, two significant cases of collision on the high seas. These decisions are another step in the application of extraterritorial law to extraterritorial marine torts. They are the case of the American steamer "The Hamilton," in collision with another American ship, 7 miles off the coast of Virginia, and the case of the French steamer "La Bourgogne," sunk by a British ship 60 miles off Sable island.

Admiralty Jurisdiction.

A state court could not take cognizance of a legal proceeding *in rem* for a collision between vessels while navigating the high seas

or the inland waters of the continent, since such a proceeding is in admiralty, and not at common law.[1]

The particular domain of jurisdiction which we are considering belongs, by constitutional grant, to the courts of the nation alone. The framers of the Constitution sought in this way to attain uniformity and consistency in all maritime transactions between citizens of the several states of the Union, or between citizens of any state and those of the lands beyond seas.[2]

Sir Edward Coke, appointed chief justice of England by the successor of Queen Elizabeth, so revered this ancient common law (das Volksrecht, la loi commune) that he defended it against both the court of chancery and the ecclesiastical courts, and, like King Canute, hopelessly forbidding the advance of the rising tide, he combatted ferociously[3] every attempt to expand the admiralty jurisdiction. Its expansion signified to him an intrusion upon the high prerogative of the courts of the common law.[4] The Virgin Queen was the first to foresee the splendid possibilities of Britain's maritime power.[5] The reactionary tendencies set in motion by Lord Coke after her death necessarily resulted in a narrowing of the admiralty jurisdiction, which did not comport with the expanding commerce of the Kingdom. The last effects of the bickerings and disputes between the advocates of the respective courts of judicature were not entirely eliminated until three centuries later, when Parliament enacted laws placing the English admiralty on its modern basis, restoring in part its ancient jurisdiction.[6]

America claims the common law of England as a proud heritage, and sacredly preserves its beneficent trial by jury as a guaranty of individual liberty.[7] But the restrictions of English common-law courts upon the admiralty never applied to the colonies. Under commissions from the mother country, the admiralty jurisdiction was of the most extensive and beneficial character.[8]

And this jurisdiction, as granted by the Constitution to the Federal courts, was, says Mr. Justice Story, "the jurisdiction which, collecting the wisdom of the civil law and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."[9]

Still early American lawyers and judges, trained in the common-law traditions, inherited a prejudice against a maritime court without a jury, and a predilection for a narrow field of juridical power in the admiralty.[10] But America, by the grace of her freer colonial practice, the necessities of her situation, and the accelerated movement of modern thought, soon established her admiralty law more nearly in accordance with that of other maritime nations.[11]

A distinguished French commentator said that "the worst maritime code would be one which should be dictated by the separate interests, and influenced by the peculiar manners, of only one people.[12]

It is a source of pride to American lawyers that the general maritime law of the world is, with slight modifications, the settled law of the United States. This law is, of course, subject to change by the national legislature, for the system is not statical, but progressive.[13]

Expansion of Admiralty Jurisdiction.

An illustration of its flexibility is found in the rule of locality as determinative of jurisdiction. The English courts of common law had established the ebbing and flowing of the tide as the boundary of the admiralty's juridical power.[14] It was in consequence of British precedents that the Supreme Court of the United States solemnly declared eighty years ago that the American courts of admiralty had no jurisdiction whatever over contracts for the hire of seamen on a voyage upon the Missouri river above tide.[15] But a narrow rule adapted to the insular England of King James was too restrictive for a continent of vast inland seas and of great rivers, and it was soon abolished. A quarter of a century later than the Missouri river case, the same court had before it a proceeding *in rem* for a collision on the tideless Lake Ontario,[16] and to the renown of American jurisprudence, adjudged the uniform admiralty and maritime jurisdiction of the United States to extend to all the public navigable lakes and rivers of the country. Thenceforth not only the main sea, but all of the navigable waters of the United States, whether landlocked or open, salt or fresh, tide or no tide, came within the jurisdiction of the admiralty.[17] In the opinion Chief Justice Taney declared that "the Union was formed upon the basis of equal rights among all the states, . . . and that it would be contrary to the first principles thereof to confine these rights (*i. e.*, the safety of commerce, the administration of prize law, etc.) to the states bordering on the Atlantic and to

1 The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451 (1866).
2 The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. ed. 654 (1875); Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612 (1889).
3 Smart v. Wolff, 3 T. R. 323 (1789).
4 Benedict, Admiralty, § 6.
5 Hughes, Admiralty, §§ 3, 4.
6 3 & 4 Vict. chap. 65 (1840); 9 & 10 Vict. chap. 99 (1846); 17 & 18 Vict. chap. 104 (1854); 24 & 25 Vict. chap. 10 (1861); 31 & 32 Vict. chap. 71 (1868).
7 U. S. Const. 7th Amendment; Maryland Declaration of Rights, art. V.
8 Benedict, Admiralty, § 114.
9 De Lovio v. Boit, 2 Gall. 398–472, Fed. Cas. No. 3,776 (1815).
10 Benedict, Admiralty, § 7.
11 Benedict, Admiralty, § 7; Hughes, Admiralty, § 4.
12 Jean Marie Pardessus (1772–1853).
13 The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. ed. 654 (1875); Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612 (1889).
14 Benedict, Admiralty, §§ 228–9.
15 The Thomas Jefferson, 10 Wheat. 428, 6 L. ed. 358 (1825).
16 The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058 (1851).
17 Dunham's Case, 11 Wall. 1, 20 L. ed. 90 (1871).

the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the western states." The march of science with its application of steam to water navigation, and the possibility thereby to navigate a vessel against an unchanging current, had foreordained the expansion of the admiralty jurisdiction. Again, as illustrating the expansive tendency, the Supreme Court had said that state legislatures have no authority to create a maritime lien,[18] but later the court sustained and enforced in admiralty a lien created by a law of Louisiana, for supplies furnished to a ship at her home port; no lien therefor existing under the general maritime law, as the Congress had provided none. The states, it was held, might legislate until Congress chose to act in exercise of its constitutional power to regulate commerce.[19]

Limited Liability.

An instance of the progressive movement through remedial legislation is the statute assimilating the law of America to that long existing in continental Europe, whereby innocent shipowners can limit their liability for damages caused by their vessel to the value of their pecuniary interest in her and her freight pending.[20] And a second instance of legislation of like kind is the so-called Harter act of February 13, 1893,[21] applicable, however, only between vessel owner and shipper. The general scheme of this statute is to make the ship liable for faults in connection with the ordinary shipment and stowage of her cargo, but to allow her exemption from liability for mere negligence in navigation or management of the vessel after the voyage has commenced.[22]

Right of Action for Death.

These preliminary matters considered, we pass to the civil liability in admiralty for the death of a human being, which was the concrete question in the two cases of "La Bourgogne" and "The Hamilton."

It is a singular fact that by the common law of England the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy,[23] or, as stated by Lord Ellenborough, "in a civil court the death of a human being could not be complained of as an injury."[24] This doctrine of substantive law had its origin in England in the technical rule of mere procedure expressed in the maxim that a personal action dies with the person: *"Actio personalis moritur cum persona."* But the contrary legal doctrine is so well established in other European countries as to be there considered a part of the general body of the law administered by maritime nations.[25]

In Holland the right of action for death seems to have prevailed for centuries.[26] In Scotland the unwritten law permits the wife or family of a deceased person to sue for damages caused by his death.[27] The German Code of 1896 (Bürgerliches Gesetzbuch) expressly specifying deliberate or negligent (vorsätzlich oder fahrlässig) injury to life as a cause of action, is merely declaratory of the law as anteriorly ruled by the German Imperial Court of Civil Jurisdiction (Reichsgericht in Civilsachen).[28] The law of Austria confers the right of recovery upon the widow and children of the deceased.[29] In France the Marine Ordinance of Louis XIV. (1681) did not mention the subject, but it is thoroughly settled by judicial interpretation of the Code Napoléon that there is a right of action for death thereunder, although the Code itself does not refer expressly to the killing of a human being. Its provisions in general language require reparation for every act of man which causes injury to another, whether produced by the defendant, his agent, or anything which the defendant has in charge.[30] The Code of Italy, literally translating and re-enacting this language, has been similarly expounded, and it has been decided that the surviving relative who sues need not even show the share which he had in the deceased's earnings.[31] This principle of the Italian law is in marked contrast to the principle underlying Lord Campbell's act and its American prototypes hereinafter mentioned. They permit the recovery of compensation for direct pecuniary loss only.[32] The law of Switzerland concerning civil indemnity for death is as specific as that of Germany; the statute of Belgium is a reproduction of that of France, and the Codes of Spain and Portugal contain a general provision requiring reparation for every damage caused to others or their rights.[33]

On August 26, 1846, Parliament abrogated the ancient rule of the English realm and gave a civil right of action for death.[34] Similar legislation creating personal responsibility has followed in most of the American states.[35]

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18 The Belfast, 7 Wall. 624, 19 L. ed. 266 (1869).
19 The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. ed. 654 (1875).
20 9 Stat. at L. 635, chap. 43, U. S. Comp. Stat. 1901, p. 2943 (1851).
21 27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946 (1893).
22 Hughes, Admiralty, § 173.
23 Goodsell v. Hartford & N. H. R. Co. 33 Conn. 51 (1865).
24 Baker v. Bolton, 1 Campb. 493, 10 Revised Rep. 734 (1808).
25 Hughes, Admiralty, § 198.
26 Grotius, bk. 3, chap. 33 (Herbert ed. London, 1845).
27 Bell, Com. (1872) § 2029; Clarke v. Carfin Coal Co. [1891] A. C. 412.
28 Bürgerliches Gesetzbuch vom 18. August, 1896 (Munich, 1906), sec. 823.
29 Das allgemeine bürglerliche Gesetzbuch für das Kaiserthum Oesterreich (Vienna, 1873). § 1327.
30 Code Napoléon. § 1382.
31 Codice Civile del Regno d'Italia (Florence, 1905, annotated). § 1151.
32 Pym v. Great Northern R. Co. 2 Best & S. 759 (1862); Coughlan's Case, 24 Md. 84, 87 Am. Dec. 600 (1886).
33 Code Fédéral des Obligations (Berne, 1881). § 50. Codes Belges LIV; III; title IV, §§ 1382 and 1384 (Brussels, 1892). El Codigo Civil Vol. 2, art. 1902 (Madrid, 1896). Codico Civil Protuguez, Parte IV, Livro, 1 Titulo, 1 (Lisbon, 1892).
34 9 & 10 Vict. chap. 93 (1846).
35 E. g. Md. Code Pub. Gen. Laws, art. 67, Statute enacted 1852.

The House of Lords, it is true, has held the terms of the English statute inapplicable to suits *in rem* in the admiralty,[36] but it seems to apply to proceedings *in personam* in that court,[37] although foreigners are probably excluded from its benefits.[38] But see Davidsson v. Hill, decided in 1901 in the King's bench, 2 K. B. Div. 606, 70 L. J. K. B. N. S. 788, 49 Week. Rep. 630, 85 L. T. N. S. 118, 17 Times L. R. 814, 9 Asp. Mar. L. Cas. 223, in which foreigners were held entitled to the benefit of the law, at least as against an English wrongdoer.

Prior to this legislation the common law of England, as already explained, denied the recovery for death. The numerous authorities on the point are so uniform that the United States Supreme Court has said that it is impossible to speak of the question as open.[39] Unless changed by statute, this archaic law still prevails everywhere in the United States, excepting perhaps in Louisiana.

And although the "admiralty may be styled, not improperly, that human providence that watches over the rights and interests of those who go down to the sea in ships and do their business on the great waters," [40] no controlling authority could be found by the Supreme Court to make the rule of the general maritime law of America different in this respect from that of the common law.[41]

Thus for many years it had been indisputably settled that, in the absence of legislation, no suit could be maintained in admiralty to recover damages for the death of a human being caused by negligence. And so stood the maritime law of the American courts when "La Bourgogne" and "The Hamilton" Cases were finally adjudicated on appeal.

Enforcement of State Statute in Admiralty.

It is perfectly obvious that the Federal Congress might pass a bill providing for the recovery of such damages for death under its power to regulate commerce with foreign nations and among the several states, and in pursuance of the constitutional provision extending the judicial power of the government to "all cases of admiralty and maritime jurisdiction," [42] but until the decision in the case of "The Hamilton" on December 23, 1907, no ruling had been made by the Supreme Court determining whether a single state could by statute create such a liability enforceable in the admiralty. The Supreme Court had indeed twenty years ago expressly declined to give an opinion upon the point,[43] and diverse rulings as to the power of a state had ensued in the lower courts. One Federal judge in a case *in rem* where reliance had been placed by the libellant on the death statute of Pennsylvania had gone so far as to say that if the state statute undertook to give a lien in case of death, he would declare it inoperative.[44] And another judge had held, when considering a case *in rem* under the Virginia statute, which then only provided a remedy *in personam*, that a state could not create a maritime right or confer jurisdiction in any particular upon an admiralty court.[45] But other judges had sustained state statutes, and by virtue thereof had enforced liens in admiralty, —in one instance even where the law did not purport to give a lien.[46]

In this chaos of contrary rulings, the Honorable Addison Brown, a most experienced judge, then presiding in the United States district court for the southern district of New York, had, in an opinion of notable perspicacity and erudition, reviewed the precedents and enforced the New York death statute under a libel *in personam*, where the tort had occurred on the navigable waters of the state.[47] And similarly, the Honorable William H. Taft, then a circuit judge, delivered the opinion of the United States circuit court of appeals for the sixth circuit, applying the death statute of the Dominion of Canada in a proceeding *in personam* where a collision had occurred upon Canadian waters.[48] These two cases, it will be observed, were instances of torts on strictly territorial waters, and the application of the local law was made by the court only thereto, but not to the high seas. By contrast, where the tort had occurred on the ocean, the Federal courts sitting in Illinois refused to enforce the law of France in suits *in personam* arising out of the sinking of "La Bourgogne." [49] The argument was rejected in Illinois that the cause of action must be consid-

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36 The Vera Cruz, L. R. 10 App. Cas. 59, 54 L. J. Adm. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324 (1884); The Corsair, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949 (1892).

37 The Bernina, L. R. 13 App. Cas. 1, 57 L. J. Adm. N. S. 65, 58 L. T. N. S. 423, 36 Week. Rep. 870, 6 Asp. Mar. L. Cas. 257, 52 J. P. 212 (1888).

38 Adam v. British & F. S. S. Co. [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844, 79 L. T. N. S. 31, 8 Asp. Mar. L. Cas. 420.

39 Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580 (1878).

40 The Highland Light, Chase, Dec. 150, Fed. Cas. No. 6,477 (1867).

41 The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140 (1886).

42 U. S. Const. art. 1, § 8; art. 3, § 2.

43 Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612 (1889).

44 Welsh v. The North Cambria, 40 Fed. 655 (Butler, J.) (1889).

45 Hughes, J., in The Manhasset, 18 Fed. 918 (1884); Holmes v. Oregon & C. R. Co. 6 Sawy. 262, 5 Fed. 75 (1880), *in personam*.

An amendment of the Virginia statute now expressly permits the filing of a libel *in rem* against the offending ship. 2 Va. Code, Annotated (1904), § 2902; and the United States circuit court of appeals for the fourth circuit enforced this statutory lien *in rem* in the admiralty where the tort had occurred on territorial waters of the state. The Glendale, 26 C. C. A. 500, 42 U. S. App. 546, 81 Fed. 633 (1897).

46 The Oregon, 45 Fed. 62 (1891), enforcing *in rem* the Oregon statute which provides that every boat or vessel used in navigating the waters of the state of Oregon shall be liable and subject to a lien for damages or injuries done to persons or property by such boat or vessel. Oregon Code (Comp. 1902), § 5706.

The Garland, 5 Fed. 924 (1881), upholding the Michigan statute in a suit *in rem*, although statute gives no lien.

47 The City of Norwalk, 55 Fed. 98 (1893).

48 Robinson v. Detroit & C. Steam Nav. Co. 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883 (1896).

49 Rundell v. La Compagnie Générale Transatlantique, 94 Fed. 366 (1899), and 49 L.R.A. 92, 40 C. C. A. 625, 100 Fed. 655 (1900).

ered to have arisen within the French territorial jurisdiction. In this condition of the adjudications, the Hamilton Case[50] reached the Supreme Court of the United States. The suit arose out of proceedings to limit liability taken in the United States district court of New York. The owners of the colliding vessels were both corporations of the state of Delaware. Each ship had its home port in that state. The collision occurred at sea, off the coast of Virginia. Both vessels were held at fault by the district court, the circuit court of appeals, and the Supreme Court, successively.[51] Eight persons (*i. e.*, five passengers and three mariners) were drowned in the disaster. There was no pretense that any of them had been negligent, and their representatives, unable to recover damages by the law of the flag, sought relief under the statute of the particular state where the ships happened to be domiciled. The statute, after enacting that actions for injuries to the person shall not abate by reason of the plaintiff's death, provides that "whenever death shall be occasioned by unlawful violence or negligence, and no suit has been brought by the party injured to recover damages during his or her life, the widow or widower of any such deceased person, or if there be no widow or widower, the personal representatives, may maintain an action for and recover damages for the death and loss thus occasioned."[52]

The libellants contended that the ships, although actually on the high seas, were still constructively portions of the territory of the state of Delaware, and subject to her laws. Counsel for the shipowner urged, with much force and cogency of reasoning, that the relation of the parties should not in admiralty be regarded as fixed by the laws of a particular state when the injury occurs on the open sea, through a purely marine tort, and that the Federal courts of America should, in admiralty, decide the liability for wrongs committed outside of territorial waters by the rules of admiralty as administered by the Federal forum, which forum gives no damages for death. And it was further urged that no state can, by legislation, destroy the very symmetry of the martime law of the Union, to preserve which was a controlling reason for conferring on the general government exclusive jurisdiction in admiralty.

But notwithstanding the argument at the bar, the doubt expressed by the court twenty years before in the case of Butler v. Boston & S. S. S. Co.[53] was now finally resolved by the Supreme Court in favor of the validity of the Delaware statute, and it was further held that the act was not confined to deaths occasioned on land, but that it created an obligation for deaths occasioned at sea which could be enforced in admiralty. And thus the operation of the rule under which Judge Brown had merely applied the New York statute to the strictly territorial waters of that state, and under which Judge Taft had only enforced the Canada statute on the strictly territorial waters of the Dominion, was now extended by the Supreme Court to the ocean itself; and the Delaware statute was there applied by the fiction that her ships were legally still a part of Delaware territory, although they were actually on the high seas of all nations. The court said further that the result of a state statute giving a proceeding *in personam* would not be the creation of different laws for different Federal districts. The liability would be recognized in all. Nor would this create any lack of uniformity. Courts constantly enforce rights arising from and depending on other laws than those governing the local transactions of the jurisdiction in which they sit. But the court carefully added that it was not concerned with these considerations in the case before it. The legislation of the United States has enabled the owner to transfer his liability to a fund and to the exclusive jurisdiction of the admiralty, and he had elected to do so. That fund being in course of distribution, "all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not," since the Federal statute allows the liability to be asserted and proved against the fund.

The views thus expressed in the Hamilton Case were inevitably followed by the enforcement of the law of France in the case of "La Bourgogne." That vessel was, as already stated, sunk in collision by a British ship on the high seas 60 miles off Sable island. Most of her passengers, her captain, and other principal officers and many of the crew, went down with her. The case, like the Hamilton Case, came before the Supreme Court upon proceedings taken by the shipowner himself to limit liability. The value of the surrendered property, consisting of lifeboats and rafts, was supposed not to exceed $100, while the total claims presented aggregated more than $2,000,000. Many death claims figured in the list. While "La Bourgogne" was held liable for the single fault of proceeding too fast in a fog, no privity or knowledge was proven on the part of La Compagnie Générale Transatlantique and the company's right to limit liability was sustained. The total fund for distribution consisted of the lifeboats and rafts; plus freight and passage money prepaid for the voyage from New York to Havre, aggregating in all less than $23,000.

The ultimate decision in the case of "La Bourgogne" might, in view of the prior evolution of the maritime law already noted, have been reasonably anticipated. In fact, Mr. C. Philip Wardner, of the Boston bar, had forecast the result of the litigation in an able critique of the earlier and contrary rulings in Illinois concerning the same collision.[54]

The Supreme Court in that case had applied the well-known doctrine of the law of the

[50] 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133 (1908).

[51] 134 Fed. 95 (1904), 77 C. C. A. 150, 146 Fed. 724 (1906); 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133 (1907).

[52] Act of Jan. 26, 1886, as amended by act of March 9, 1901. Del. Laws, 1901, vol. 31, p. 500.

[53] 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612 (1889).

[54] 21 Harvard L. Rev. 1–22, 75–91.

flag to a tort on the high seas. But in the Hamilton Case it was not the law of a foreign power, but the law of a particular state of the American Union which was applied to a tort similarly committed. The vessels registered in Delaware carried the flag of the United States of America, and not the flag of Delaware. The two ships involved in the collision were bound, one from a port of New York to a port of Virginia, and the other from a port of Virginia to a port of Pennsylvania, and consequently were engaged in commerce among the several states. The legal embarrassment is apparent, arising from the duality of sovereignty in the American government. The several states are, on the one hand, mere integral parts of an entire domain constituting the United States of America, and have ceded to the central authority an absolute and exclusive jurisdiction in admiralty. On the other hand, they have retained as independent sovereignties a jurisdiction over the unceded or unprohibited areas of governmental power. And thus Delaware has been treated by the Supreme Court as a sovereign entity legislating for an American ship while on the high seas, because the vessel was registered in a port of Delaware and would by legal fiction remain everywhere a part of her territory. But even if we are persuaded of the correctness of the decision in the case of "The Hamilton," the present situation is anomalous, and the principles enunciated, if applied to support an independent action brought by the personal representatives of the deceased against a ship or owner to recover for death, may lead to great difficulties and certainly to unsatisfactory results, unless Congress enacts a general death statute.

In 1875 the Supreme Court declared that the "Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country; that it could not have been the intention to place the rules and limits of the maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." The court further said that it would undoubtedly be far more satisfactory to have a uniform law regulating such liens.[55]

Delaware, the first state to adopt the Constitution of the United States, undoubtedly surrendered to the courts of the Federal government exclusive jurisdiction in admiralty, and to the Federal Congress the power to regulate commerce with foreign nations and among the several states. To say, then, that an individual state, like Delaware, may, in the absence of paramount legislation by Congress, regulate the rights of those who travel on the high seas in American ships registered at her ports, is indeed an anomalous, even if it be, as it probably is, a necessary, sequence to earlier decisions. The law of the sea is of universal obligation. No single nation, certainly not a single state, should be allowed to create obligations for the world.[56] "Everywhere the sea's the sea."

Looking to the future, it would perhaps have been more fortunate for the court of last resort to adhere to its own law, the law of the admiralty forum, and to deny to the representatives of those killed in the collision the damages which could not be recovered under the general maritime system, but only by the special statute of Delaware. Congress could then have changed the legal rule.

From the foregoing it is apparent that there is no present right of recovery for loss of life by negligence on the high seas, either by the general maritime law of the United States or by Federal statute. It is now also settled by the Hamilton and La Bourgogne Cases, that if the owner of an offending ship surrenders the remains of his property with freight pending in order to limit his liability, persons entitled to an action by reason of the death of their decedent under the law of the ship's flag or domicil, will be allowed, upon being brought into court, to participate in the distribution of the fund. But, on the other hand, it has not yet been determined by the Supreme Court in a case of death on the high seas, that a lien created upon the ship itself by a statute of one of the American states will be enforced in admiralty, nor has it been expressly decided by that court that an action *in personam* will lie in the admiralty under a statute of the state of the ship's domicil. What may be the next step in the development of the law does not yet appear.

Congress Should Act.

It is hoped that Congress may speedily grant the right of civil redress in death cases provided by Lord Campbell's act and the Continental Codes. A private remedy for the negligent deprivation of life, existing throughout western Europe, and in most of the American states, as well as in the Federal district of Columbia, it behooves the United States in their national capacity to assimilate their law to the European law and that of the component states of the Union.

It is true that the American courts of admiralty have, without the aid of a statute found in several instances of death, the means of preventing the injustice which would have followed an adherence to the law of the admiralty forum, for the paramount and universal law "laid up in the bosom of God" upholds the sanctity of human life. Justice, the great interest of mankind on earth, is the ligament which binds the civilized nations together.[57] It knows no distinction of nationality, of time, or of place. Its universality, its duration, and its immutability are thus portrayed in the lofty words of the greatest of Roman orators: *Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnis gentis, et omni tempore, una lex, et sempiterna et immutabilis continebit.*[58]

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55 The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. ed. 654 (1875).

56 The Scotia, 14 Wall. 170, 20 L. ed. 822 (1872).

57 Webster's Address on Story.

58 Cicero, De Re Publica. III, 28–33 (Tauchnitz, Leipzig, 1865, p. 214).

An American Merchant Marine

BY LEWIS NIXON

IS the shipping question a simple one? Yes and no. The writer has been studying it for twenty-seven years, and for the past twelve years has devoted an hour a day to research and consideration, and yet each day finds some phase of the question that is new. And yet in general it is simple. Ignoring history and experience, there are many who, when the humiliating facts connected with our dependence on foreign nations are once appreciated, jump to conclusions and with the cocksure tendency of the age wish to apply coal tar panaceas to cure a chronic malady.

I shall not attempt to follow the histories of maritime nations, as they can be read by those interested, but I shall tell what we have done, and give in a simple story how we gained the mastery of the seas, and how, through being tricked by abler statesmanship, we have lost it.

In order that the reader may study this great question for himself, I shall give facts and few conclusions; for while I have definite and positive ideas they all arise from a study of history, and if I present aright the history the conclusions will follow as a natural sequence.

When the thirteen colonies of Great Britain achieved their independence they were impoverished, without an adequate merchant marine, and conditions were such that continuing as they were their poverty would be increased and their marine would vanish. The great men brought to the front by great events realized that the three pillars of a nation's greatness were commerce, agriculture, and manufacturing.

Regulation of Commerce.

The thirteen states had as many means of regulating commerce, leading to endless confusion and loss; so it was seen that a central power to regulate commerce was essential, and such necessity was the compelling cause of the formation of the Union and the adoption of our Constitution.

The various states delegated their separate powers to regulate commerce, to the central government, and this power was accepted as a sacred pact or duty which must be exercised.

It will be said that the power to regulate commerce certainly means such regulation as will prevent its disappearance. Yet, while we have in the past carried as much as 93 per cent of our foreign commerce, we now carry less than 8 per cent, and our merchant marine in the oversea trade is less than it was in 1810, —one hundred years ago.

There is a tendency to regard the Constitution as a thing of the musty past, and a school of foreign political economy has been foisted upon us in late years, wherein the fetish of cheapness is held up as the chief end of man for others, while given the lie in all lines of national endeavor in practise by the very ones who preach it.

We are safe in assuming that those who took part in the drafting of our Constitution knew what they meant by its provisions. They were leaders in public thought, and its ideals and intentions were carried into effect by the same men by appropriate legislation in our national Congress.

Let us see how they interpreted the meaning of "to regulate commerce," by examining the laws passed that we might build up and provide for the maintenance of an American merchant marine.

First, a discrimination was made by allowing a duty of 10 per cent less on goods imported, if brought in American bottoms. Differential tonnage taxes were provided, 6 cents per ton on American vessels, 30 cents per ton on American built and foreign owned vessels, and 50

cents per ton on foreign built and owned vessels. The great Asiatic trade was secured by grading duties on tea far higher in foreign vessels than in American vessels. American registry was confined to American built vessels. The same care for a man under our flag at sea as on shore inspired laws to secure a proper food scale for American seamen. In seven years our shipping increased 385 per cent, and by 1826 we were carrying 93 per cent of our foreign trade under the American flag.

Direct and Indirect Trade.

In 1815, as the price of peace with Great Britain, we abandoned, by a convention signed with her, further discrimination in the direct trade.

Since direct and indirect trade will be mentioned often in this article I will here say that by direct trade we mean trade with a nation in its own ships; by indirect trade, trade with a nation with ships not under that nation's flag. That is, if an English ship brings products here from London this is direct trade, but if it brings them from Lisbon it is indirect trade.

Foreign wars which resulted in giving us great advantage as a neutral power prevented this act from being as harmful as it might have been, but its results were adverse, and prevented our realizing the advantages of our neutrality as we might have done. But in 1828, in the hope that we might gain the trade of the West Indies, by a crowning act of unwisdom and mistaken legislation, we threw open our indirect trade by suspending our right and duty to regulate commerce in the indirect trade.

Decline of Our Merchant Marine.

This betrayal of a constitutional duty brought about the decline of our merchant marine. You will be told that the reasons are economic, that the change from wood to metal for hulls of ships, from sails to steam for propulsion, our Civil War, and the great problems and demands of internal expansion, are the reasons for the decline. But the decline began immediately after we ceased to regulate commerce as provided by the Constitution, and, while the above influences helped us along the downward path, they came years after it started, and a study of the question shows that had they not been operative there would have been no revival.

Other factors, such as discriminations against our vessels by insurance companies and rating companies, the bonded warehouse system giving credit for duties; contracts for advance charters, railroad rebates, foreign shipping pools or conferences and the payment of $46,000,000 a year in the aggregate by other nations to aid their marines, have supplemented this betrayal by our national legislators of a duty enjoined by their oath to support the Constitution.

Reviving Our Maritime Power.

Before discussing remedies, let us see whether rehabilitation is worth while.

We are paying not less than $300,000,000 a year to foreign vessels to do the carrying of our people and our products on the oceans. We shall double our foreign trade in the next twenty-five years. We find upon examination of statistics that more and more of our exports consist of manufactured articles that must seek markets through competition, and less and less of such products as foreign nations must buy to feed their people and factories.

In 1907 we exported, in round numbers, $1,800,000,000, and imported $1,200,000,000; so that, other things being equal, this balance of trade statement should indicate a credit abroad of about $600,000,000; but every time a steamer went out taking a few hundreds of thousands of gold a shiver went through our financial districts, so there must be an unaccounted drain in some quarter. This is the vast sum paid for ocean transportation, and as long as this is not kept at home we must dig and delve and sweat to produce an excess of exports over imports; for commerce includes transportation as well as trade or barter, and a balance of trade statement as ordinarily given is as misleading as would be the statement of a merchant which did not include his delivery charges. We must add our transportation charges to our imports, as they are the price paid for the product of a foreign plant just

as much so as if that product were a bolt of silk or a case of wine.

It is said that we get value received. But it cannot be denied that if we carry our exports in our own ships, we increase our credit abroad where we want it increased, while if we bring our imports in our own vessels we reduce our debt at home where we want it reduced. While our exports may be carried very well, it is certain that, with all trade connections in foreign hands, they can largely control the disposition and prices. English freight charges, for example, range the highest, while they get our goods at the lowest possible rates. Wheat is at times so poured into Liverpool and Bristol, and so sags the market, that the price of wheat is lowered upon the most distant farm.

I shall not go into the industrial, economic, military, and political reasons that force an independent nation to have a marine of its own, as the discussion of any would take an article longer than this one; but I shall content myself with saying that, until we stop this drain of our basic money, we shall be subject to recurrent periods of depression.

Without uniform prosperity, we cannot have cheap money; with the menace of a possible call, manufacturers cannot undertake programmes covering several years, nor extend credits. Naturally this affects our competitive export trade.

In our early history many adverse balances of trade were turned into favorable balances of commerce by the earnings of our merchant fleet.

A nation which depends upon other nations to do its carrying on the sea is tributary to the nations that do its carrying, and, as its dependence increases, so will the tribute.

We are faced upon the oceans by a monopoly of ocean carriage, together with inordinate naval power; yet the very men who rail against domestic monopoly not only fail to appreciate this great menace to our national independence and prosperity, but actually belittle the efforts of those who are attempting to awaken our people to a realization of it.

The merchant marine necessary to make us a creditor nation not subject to panic and bankruptcy in case of foreign wars between our present carriers is one of from 6 to 7,000,000 tons.

Mail Lines.

Mail lines are an important part of a merchant marine system, but far from the most important part. In fact, efforts to establish mail lines can have no warrant unless as means to the establishment of a cargo carrying merchant marine. They are not even the first steps to be taken, for while we should get the mail lines if we bring about a demand for cargo vessels commensurate with our trade, it does not follow that the establishment of mail lines, except accompanied by a preference for them and cargo vessels as well, will bring the cargo vessels. We might even conceive of our mail lines run at government expense carrying the letters that order and the drafts that pay for freight carried under foreign flags.

Subsidies.

At present lacking the all-pervading mercantile plant with world-wide connections that we had in the days of our marine prosperity before we suspended our right to regulate our own commerce, it costs more to carry freight under the American flag than under foreign flags. So much is this the case that if we gave ships to our people to-day and still refused to carry out the pact of the Constitution to regulate commerce, they could not run them in competition with those of other nations who, together with lower wages and cheaper food, are aided by governmental preference, insurance, and rating discriminations, subsidies, subventions, and the devices which were substituted for such discrimination as we gave up in their favor. For ours is a government of limited powers clearly defined, and when we deliberately relinquished our power to regulate commerce in ways that squared with the Constitution, other nations could substitute devices that we under our limitations are powerless to meet.

I regard payments out of the National Treasury to equalize operating costs as not only unconstitutional, but ineffective. Even with equality of cost of running,

we obtain only a possibility to compete, but competition does not secure employment. What we want is a demand for American ships based upon a growing trade in American bottoms, and the ships will come quickly enough without government aid.

Regulation of Indirect Trade.

To-day nearly 60 per cent of our foreign trade is indirect. A simple regulation of our indirect trade strongly handicapping foreign vessels would throw this trade to our vessels and bring about an immediate demand for them. We have been so long in subjection to the foreign steamship agent, the foreign insurance agent, and the foreign merchant, that any proposal looking to the assertion of such an intention will be looked upon by them and the nations who foster them as an interference with vested rights.

Our True Policy.

We are building a canal at a cost of $500,000,000 and talk of opening it in 1915, and yet make no move that will secure American ships to ply in it. Of course it should be made a free highway for American ships, but this idea will be combatted by the same argument advanced against other really helpful legislation; that it might hinder those who now monopolize our commerce and so be displeasing to them. The new school finds it impolite and boorish to safeguard American privileges.

The United States is a world power and vitally interested in world commerce. As nations increase in wealth and desires, ocean carriage augments in volume and importance. We have of late been paying great attention to monopoly at home, while a menace of vast portent has grown upon the oceans. Our commerce must not be monopolized by England, Germany, Japan, or other nations, for monopoly leads to abuse, as can be seen by anyone familiar with ocean carriage. The strategy of trade is as important as the strategy of war, and enlightened patriotism requires that we safeguard our country against any and all possible adverse combinations. We are faced upon the ocean by a monopoly of shipbuilding, of commerce, and of the arts and accessories of navigation, together with inordinate naval power. Such a condition, threatening our prosperity and our independence, should arouse us to immediate action.

Now in conclusion let me say that there is no way that we can resume our destined place upon the oceans without displeasing some one, and the greater the benefit a country receives from our suspension of the right to regulate commerce the greater the resentment against any and all steps taken to resume such regulation. We cannot reap without sowing. Nations concede no rights that are not asserted. Whatever the means employed, such is our prostration, they must be drastic and compelling, or they will fail and so lead to further loss and discouragement. Jefferson in speaking of the discriminating policy said: "It is not to the moderation and justice of others we are to trust for fair and equal access to markets with our productions, or for our due share in the transportation of them, but to our own means of independence and the firm will to use them."

The Regulation of Business by Law

BY J. H. PAXTON

Of the New Mexico Bar

SINCE the beginning of civilization, business, as a phase of human conduct, has been regulated to a greater or less extent by law; the fundamental statute upon this subject being some form of the Eighth Commandment, "Thou shalt not steal." The established method of regulation has been the natural method of the physical and spiritual world, through general laws or statutes, sanctioned by penalties inflicted on the wrongdoer by the state, or by liabilities imposed on the wrongdoer by law, and exacted of him by the injured person through the public instrumentalities of the courts.

It is characteristic of the natural method of regulation that the law is always general; and whether a particular act is a violation of the law can be authoritatively determined only after the event. As in the case of the natural and divine law, so in the more artificial system of the state: the individual must determine for himself whether a proposed act will offend the law or not, and must suffer the consequences of his mistake, either by way of penalty or liability; for his ignorance of the effect or meaning of the law will not excuse him.

Another characteristic of the natural method of regulation is that it operates on the natural person, upon whom the penalty or liability falls; for seizures, sequestrations, and forfeitures of property are merely a form of enforcing personal punishment. And upon the strict theory of conformity with natural and divine law, the more artificial human law should contemplate only the natural person or "God-made man," who has a soul and conscience; for the enforcement of the law depends chiefly on the aggregate conscience of the social community.

But human ingenuity, for its own convenience, has created an artificial person, the corporation or "man-made man," a separate and distinct entity, subject to a legal liability, but without any individual moral responsibility which the law can lay hold of. For many centuries the corporation was used merely as a business means or instrumentality, and as such it served, and is still capable of serving, a very useful purpose; the moral responsibility of its constitutent natural persons being kept alive and subjected to the operation of the law. But by a fiction of law the corporation has always been regarded, in the eye of the law, as a person and entity distinct from its individual constituents; and a startlingly sudden development of the system of artificial rules based on this fiction, and of the application of the natural rules to the facts and circumstances of corporation business, corresponding to the development of the corporation itself, has in recent years made a Frankenstein of this useful business instrumentality. In particular instances the artificial person has grown so great, and its constituent natural persons have been so multiplied, and their individual relations to the artificial person so minimized and attenuated, that these latter are relatively invisible to the naked eye of the law. Or, to abandon the metaphor, the law, operating within rules and forms of evidence and procedure originally devised for natural persons, but now outgrown by the giant corporations, is no longer able to reach through the artificial person and lay hold of the conscience of its natural constituents. Consequently the deterrent effect of legal punishment is in large part lost, when the great corporation is the offender, and, worse still, the punishment is little more than a mere formality.

Civil and social disgrace or disqualification can have no terrors to an unmoral entity, incapable of political rights or social privileges, and whose very existence is a legal fiction. And the enforcement of a mere pecuniary liability effects neither penance nor repentance, where there is no conscience to stimulate. The stockholder exercises no individual control over the mass of wealth which really constitutes the corporate entity, and hence feels no individual responsibility; the director is a mere manager or agent for the indeterminate multitude of stockholders, and easily passes up the moral responsibility, the effect of which is dissipated by subdivision before it reaches the ultimate owners. It is apparent that the business conduct of large corporations cannot properly be regulated by law, according to the natural method of regulation.

Methods of Regulation.

Conditions have not changed except in relation to the great corporations; and the problem is more exactly stated thus: How are we to regulate big corporation business by law? There are but two modes of solution: First, to devise new laws and new methods of legal operation adapted to the peculiar nature of the corporation; or, second, to devise new methods of legal operation, that is, new rules of evidence, procedure, and process, whereby the old laws can reach through the corporate person to the natural person who is always behind it.

The first-mentioned solution does not commend itself. Principally, because it will introduce a double rule of human conduct, the two branches of which must necessarily diverge in practice. In fact, the divergence is already evident; for it is too common for men to incorporate in order to do that which they would not dare attempt on their individual responsibility. Already the corporation is used as a buffer against moral and legal responsibility; and the practice would inevitably increase under such a double rule. Moreover such regulation would, for the most part, be effected by means of bureaus, largely executive, and therefore political in character; a corporation bureau must be marvelously constituted to escape the influence of the vast political power of big business.

The common law regulates human conduct by operating on the natural person. New rules must be devised, whereby the law can reach through the artificial person and lay hold of the natural person. This seems a simpler task than the invention of a distinct system of law applicable to corporations; more effective, because operating on the natural person with a conscience; and less liable to abuse, because less arbitrary and artificial. It is marvelous what can be effected by one short and simple rule of law, such as the statute of uses, which swept away a vast mass of abuses and evasions of the statutes of mortmain. In connection with a compulsory registration of corporation boards of directors, consider the effect of some such statutory rule of evidence as this: Hereafter proof of any fact, as against a corporation, shall be deemed conclusive proof on the same fact as against any member or members of its board of directors; and whenever any fact will be presumed as against a corporation, the same fact shall, in the same degree of conclusiveness, be presumed as against any member or members of its board of directors; provided, however, that any such director may rebut such conclusion or presumption only by clear and satisfactory proof showing that he actively and in good faith endeavored to prevent the corporation from committing the offense charged. It seems that such a statute would violate no natural or constitutional right. It is a recognized fact that the board of directors is the corporation, in so far as its positive action is concerned; and an unlawful combination is a mere harmless intention until it proceeds to some overt act. And when a man puts himself in the position of directing any instrumentality, it is but just that he should bear the responsibility of such direction, unless he can positively clear himself.

The rule of evidence here suggested may prove inadequate, but there is no doubt that an adequate rule or system of rules can be devised upon the principles of the common law. It is axiomatic that guilt is personal, and the common law can find a way to catch the guilty person. The simpler the rule, the better; and it is incumbent upon the legal profession to work it out.

Government or Private Ownership of Trusts

BY MORRIS HILLQUIT

Of the New York City Bar.

[Ed. Note.—No one is better qualified than Mr. Hillquit to present the views of those who advocate government ownership of the trusts, rather than their dissolution or regulation. We present his paper as an interesting contribution to that phase of the discussion.]

THE trust problem has of recent years become the most frequent and popular topic of discussion in American assemblies and in the American press. And there is a good reason for it. The trusts are not a mere political issue, nor an abstract academic problem. They are a powerful reality with which we all come in painful daily contact. They produce most of the things we need, and fix their quantity, quality, and price. They practically determine how much we shall eat, what we shall wear, and how we shall live. The trusts are very much interested in us, and we are at last beginning to be somewhat interested in them. To-day we may still consider what we shall do with the trusts; to-morrow we may have only the sad privilege of reflecting what the trusts have done to us.

What shall we do with trusts, then?

It seems to me that the question cannot be answered satisfactorily without reference to the true meaning, the origin, methods and effects of the subject under consideration.

Origin and Growth of Trusts.

I will therefore begin with a definition, and say that a trust is a combination of private capital controlling an industry or a substantial part of it. It may be based on special privileges, such as patents, franchises, or protective tariff, or it may be based on the ownership of the principal sources and instruments of production in an industry. It must, in all cases, be big enough to exclude or largely curtail competition. The trusts are not inventions of rapacious American capitalists. They are the logical medium of modern wealth production, and the inevitable culmination of a process of industrial development running through many generations. The foundation for the trusts was laid when the old-time hand tool gave way to the powerful modern machine, when the modest mechanic's workshop was supplanted by the immense factory, and when individual work was succeeded by the system of mass production. Their growth was determined by the application of steam and electricity to mechanical uses, and by the appearance of railroads and steamboats, telegraphs and cables. The independent mechanic belongs to the period of individual custom work; the partnership and the small corporation answer the requirements of local markets, the trusts typify the era of national and international markets. That the trusts are not accidental in their origin and growth is shown by the fact that they have sprung up during approximately the same period in every country of advanced industrial development. Germany and Austria, England and France, have their trusts, as well as the United States. The trusts thrive under the policy of free trade almost as well as under that of protection. They adjust them-

selves readily to all climates and temperaments.

Effect of Trusts.

These are the causes and the origin of the trusts, and now let us consider their effects for good and evil. As mere consolidations, the trusts unquestionably represent a distinct improvement over competitive business on a small scale. They reorganize the industries on a large and comprehensive plan. They eliminate waste and duplication, and do away with expensive and unproductive machinery of advertising and canvassing for trade. They introduce uniform methods and standards in industry, and bring about more efficient and economic production. The trusts furthermore have the power to regulate the supply of commodities in accord with the demand, thus avoiding overproduction, the principal cause of all disastrous industrial crises.

These beneficial features of the trusts are, however, more than offset by the evils which they breed. The trusts, as they exist to-day, are primarily maintained for the purpose of producing profits for their owners and promoters. The promoters' profits are made in the organization; those of the stockholders, in the operation.

The first act of the trust is almost invariably an enormous overcapitalization. Stocks and bonds are issued out of all proportion to the actual value of the property invested, and these "securities" clamor for eternal dividends and interest. Billions of dollars of such trust stocks and bonds are afloat in this country to-day, and the people of the United States pay an annual tribute of hundreds of millions to the holders of this paper. The trusts hold a blanket mortgage on the people, on the fruit of their work and the means of their life, and that mortgage covers all generations to come.

To provide for dividends and interest on their insane capitalization, the trusts must "earn" big profits, and these can only be had at the expense of the worker and the consumer.

But more baneful even than the economic evils of the trusts are their moral and political effects on the community. The trusts have developed crime, fraud, and corruption in commercial life to a degree hitherto unknown. In their mad race for profits, the dollar has become their sole aim of life, code of morals, and religion. Human life and welfare count for nothing. They adulterate, falsify, and poison foodstuffs to enhance their profits. They neglect safeguards in their factories, mines, and mills to save the expense. They neglect prudence in the operation of their roads and steamboats to save time. For time is money, and money is more precious than life.

The trusts, furthermore, have a vital interest in subverting the governmental powers of the country,—legislative, administrative, aye even judicial,—for the advancement of their business. Hence they have a direct incentive to seek the control of the political life of the nation.

The trusts are the greatest menace to the democratic institutions of this country.

These then are, briefly stated, the main effects of the trusts, both for good and evil.

Proposed Remedies.

The problem before the country now is to devise a method by which all the beneficial features of the trusts would be preserved and its evil effects eliminated. No proposed solution of the problem can claim to be the solution, unless it attains both objects.

The remedies which are being proposed for the cure of the trust evil may be classified under three heads,—the "breaking-up" of the trusts and a return to general competition, the government regulation of the trusts, and finally government ownership and operation. Let us briefly analyze them in their order.

Dissolution of Trusts.

The plan of "breaking-up" the trusts, which was once a very popular political slogan, is now conceded by most thinking persons to be both impossible and undesirable.

We can as little destroy or prevent great consolidations of capital, as we can dismember the modern machine,

banish steam and electricity, or restore the stage coach. Human hand cannot stop the wheel of progress, nor revive the ages that have gone down into history. The United States Supreme Court has recently tried that experiment, and nine men have solemnly sentenced two monster trusts to death and oblivion. They have decreed that the Standard Oil Company and the American Tobacco Company be disintegrated and dissolved into their original component parts, and have ordered that the stockholders, who are identical in all "disintegrated" concerns, forthwith begin a fierce competition with themselves. I understand that the stock of the Standard Oil Company has since increased in value about $200,000,000, and that of the American Tobacco Company about $100,000,000, and the public notices no frenzied competition between the original constituent companies, nor any reduction of prices.

But even if it were possible to break up the trusts, and to return to a system of general competition with its attendant inefficiency, waste, and industrial chaos, it would be about as desirable as a return to feudal disorder or slave economy.

Regulation of Trusts.

Let us then turn to the other proposed remedy, that of government regulation of the trusts. It is undoubtedly saner than the adventurous notion of destruction, and may have some merit as a temporary, transitional measure. But it is not a solution of the problem. At best it is a compromise. It does not touch the root of the malady, and what is worse, it threatens new and greater public evils.

Government regulation, as I understand the term, means such control and active interference by the government in the operation of trustified industries as will insure the elimination of their principal evils. That involves cutting down trust profits to a "reasonable" norm, compelling trusts to improve their service and to better the condition of their employees. Let us see what that task implies.

The first question that would confront the government would be to determine what is a "reasonable" profit. There is really no natural or logical standard by which to measure the reasonableness of profits, and, as a matter of fact, any "profits" representing workless income are a purely arbitrary levy upon the industry of the workers and are unjust and unreasonable. But let us assume the government will fix it at 5 or 6 per cent. To compute such profits it will be necessary, first of all, to determine the principal upon which they are to be paid. It is obvious that any limitation of the rate of profits must be futile so long as the trusts are allowed to water their capital without restriction. The government will therefore have to limit the capitalization of the trusts to the actual value of their invested assets, and will have to determine the latter in each case. It will next have to ascertain the volume of business of each concern and the cost of production, eliminating from the latter all wasteful and needless factors, such as exorbitant salaries of officials, etc. It will then have to fix the prices of commodities and rates of services, and fix them absolutely. A mere maximum price will not check ruinous competition, a mere minimum price will not solve the problem of the consumer.

To insure better service the government will have at all times to examine the quality of the product or service, to establish standards, and make regulations for them.

And finally to force better treatment of the employees, the government will have to fix minimum wages and maximum work hours, and establish proper safeguards and sanitary conditions in the plants.

In other words, the government will manage the industries, direct the operations, and do the accounting of the trusts, and leave to the owners practically nothing but the task of collecting their profits. There is no escape from this conclusion. Government regulation must either be thorough and follow out the entire program just outlined, in which case it comes dangerously near to the dreaded plan of "confiscation," or it may fall short of this program, in which case it will fail of its purpose.

There are, however, even more funda-

mental objections to government regulation of the trust.

The most vicious feature of modern industry is the antagonism between the employer and the worker, and between the producer and the user. Modern industry is always in a state of warfare and rebellion. The relations between employers and employees are characterized by strikes, boycotts, lockouts, and blacklists, or at best by a condition of suppressed hostility. The relations between producers and users are as cordial as those between the highwayman and his victim. This antagonism cannot be removed by government regulation.

But even more serious would be the political effect of government regulation. We have had occasion to refer to the interference of the business organizations with the government and politics of the country. This interference is due to the fact that the organizations have a direct material interest in certain legislation, and in certain administrative and judicial actions. Under a system of "government regulation," every trust will be deeply, vitally concerned in the laws governing such regulation and in the *personnel* of the regulators. They will retain their private wealth and hence their power to corrupt the government, and they will have a tremendously large motive for exerting it. It will not be the government that will regulate the trusts, it will be the trusts that will regulate the government.

Government Ownership.

As against all these measures there is proposed the national or government ownership of all trusts, and I claim that this is the only plan that solves the problem and solves it on a basis of reason and justice.

For, after all, the trust problem is not a mere question of the form of industrial organization, but one of fundamental principles and methods of producing and distributing the wealth of the nation. What lies at the bottom of the seemingly unsolvable trust riddle is the contradiction between the social character and functions of the trusts and their ownership by private individuals. The same problem confronts us throughout the industrial life of the country. The trusts only happen to present it in a more acute and palpable form.

What we call the industries are simply the processes by which we secure food, clothing, and other necessaries of life for the people. The management of industries is the process of sustaining human life. It is a vitally social function, which by its very nature devolves upon the community as such, and should not be left to private hands, to be conducted for the enrichment of a group of individuals without regard to the public welfare.

Our fertile soil lined with enormous treasures of metallic and mineral deposits is there for the needs of the people, not for the profit of stock gamblers or trust promoters. The marvellous modern machinery of production and transportation, evolved by generations of workers and thinkers, is there for the purpose of facilitating the task of producing the necessaries and comforts of all human beings, not for the accumulation of fabulous wealth in the hands of a small number of capitalists.

The days of the individual tool and individual production have passed irrevocably. The modern tool is a social instrument. It is operated by the multitude, it produces for the masses, it is indispensable to the life of every member of the community. He who owns the tool for the production of the necessaries of our lives owns our lives, owns us. The trusts own our tools, hence they own us. The only way in which we can emancipate ourselves from the trusts is by owning the trusts.

The Future Influence of the Panama Canal upon America's Relations with the World.

BY COL. JAMES HAMILTON LEWIS

Of the Chicago Bar.

AMERICA must awake itself to the complete consciousness that the United States has changed the policy of a century. This Republic has embarked upon new seas. And her adventure is fraught with great perils, but her people are equal to the emergencies and are prepared for the events which may pursue the new policy. To charge Europe or Asia for the use of our canal for shipping is to invite the ports of Europe and Asia to lay a retaliation tax on all American goods entering European or Asiatic ports. This would result in cutting off our foreign trade completely. To not charge the world's shipping is to be in debt for the construction and maintenance of the canal, to the loss of $600,000,000 to the American people. To charge our own people a price sufficient to pay the canal expense would equal the freight rates of the railroads,—and no reduction of rates could come from that. To charge ourselves nothing is to continue the tax on the citizen to pay for and keep up the canal. As a business proposition every advantage is offset by a corresponding evil.

Monroe Doctrine Now Dead.

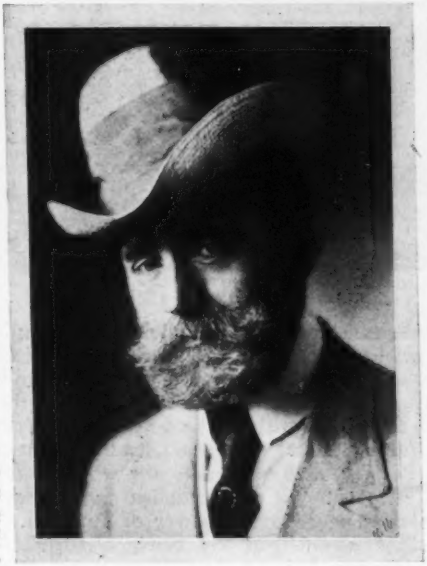
Whatever reasons may have existed in the past for the United States to have remained an isolated Republic—distant and divorced—from the commercial and territorial operations of the world, these have all been changed and reversed by the policy that has decreed the construction of the Panama canal. Heretofore America could have remained an integral nationality, untouched by European or Asiatic countries, save in friendly intercourse, and in nowise entering into the spheres of these countries, or their commercial or military entanglements. Under such conditions, America would elect as to whether she would sit in complaisant mood and beckon for trade, and accept the consequences whether her invitation be accepted or rejected. Or whether she would move out, and by her personal presence prove, by the superiority of competition, her supremacy, as well as her right to partake and enjoy the fortunes of the earth for the benefit of her citizens. Doubtless with great respect, but with little obedience to the views of the fathers of this Republic, our present government, voicing the wishes of the people, have chosen the latter course of entering into the affairs of the world by moving the legions of our forces, both military and commercial, to the foreign fields of action. We have taken the Philippine Islands and established government there. We have entered with England into a commercial control of a part of a Japanese sphere in Chinese Manchuria. We have now stepped into Central America, seized one of the states, and, from military necessity, appropriated Panama, and lent ourselves to a joint scheme of financial administration in Persia. And lastly, we have announced the intention of America,—by military force if need be,—to enter into the affairs of China to maintain the neutrality of that country as against invading forces of either Russia,

Germany, or England. Military detachments of the United States have been sent from the Philippine Islands to the new Republic of China, with a view of securing this end.

The question of the wisdom of this course is not now to be debated. It is a finished fact, and has to be treated as an American act, to be defended by all Americans.

War Will Result.

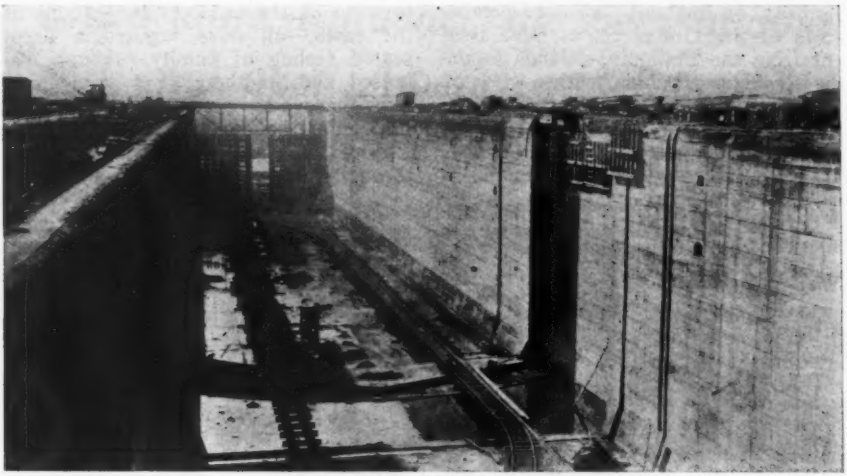
These events of our new departure necessarily have aroused feelings of hostility from all the countries of the Orient. They regard us, as they do the European nations of Europe who have heretofore been bent upon the conquest of territory, as intruders, if not invaders. Japan and China now confront the fact that, while we will not let either of them bring their citizens into our country, we insist on forcing them to let our citizens in their country. That while we cannot let them colonize our territory in an American country,—we insist upon colonizing their territory in an Asiatic country. That this will force retaliation from these people as penalty for our refusal of reciprocity is inevitable. Such is ever the course of nations. South America—bitter towards us for having forcibly wrested Panama from Columbia—and Mexico, in fear that our next move is that—which clearly it must be—to take Lower California (which is the Mexican state joining the state of California), and Central America, seeing that it is inevitable that the United States must put a protectorate over Honduras, Nicaragua, and Costa Rica, in order to be assured that those countries would maintain such peace and order as would permit the enjoyment of the canal by the nations of the earth,—all have aroused a deep-seated feeling of enmity,—though disguised and smothered, yet smoldering. Now that we have cut the Panama canal through the isthmus into the Pacific seas, Europe has as much right to pass through our territory to Asia as we have, and Asiatic vessels through our canal to Europe as ours have. While we have no treaty with Asia to secure this privilege, we have with England, and the spheres of English influence both in China and Japan—where she maintains government—will force upon us the same privilege to the Asiatic in this respect as granted to Europe. In this condition we find America with the south open to the assaults from enemies, from Asia and from Europe.



JAMES HAMILTON LEWIS

These enemies must arise as commercial competition is enforced by us and military aggression multiplied in the form of defense of our rights in either Central America, Mexico, or China. Resentments from these entrances upon our part will take the form of retaliation.

The canal in such event will occupy the interesting phase of being a weapon of assault and injury upon us, as great as that of defense and benefit. Central America, or the inimical forces in Panama alone, with $100 of dynamite, can blow the canal out of commission and render it useless to the Navy. The Navy that is then upon the Pacific would promptly be set upon by the combined navies of Asia, and we would be powerless to reach our own—by the Cape—with the Atlantic squadron in time to save it from defeat. On the Atlantic side, the combined South American coun-



Lock Chambers at Pedro Miguel

tries, with the secret friendships they would get from our enemies in Europe, could hold the Atlantic squadron at bay, because of the inability of the Western division to make connection through the canal to the relief of the Atlantic.

A Military Republic.

As the Panama canal was never constructed with a view of commercial profits, but merely, as ex-President Roosevelt has well said, as "a military necessity," and as President Taft has lately officially stated, for the purpose of "augmenting the navy,"—it is apparent that its whole use is one of military purpose. This establishes that it is the policy of our government to take such steps as military necessity may require to enforce our pre-eminence in any sphere of the world, where the needs of our people command, or the spirit of our institutions justify. The canal, then, must be so fortified that millions of dollars annually must be expended for the purpose. It must be so surrounded with military forces that millions of dollars must be expended to maintain the Army. Then, in order that in the Pacific there should be a navy of such quantity and quality as would serve to deter assaults upon our Asiatic possessions, this is compelled to be in itself sufficiently large to comprehend the complete defense of the Pacific coast and Hawaii and the Philippines. While on the Atlantic the squadron must be so doubled and multiplied in number and in quality as to be in itself sufficient for the defense to the South Atlantic and the Eastern coast, or to co-operate as a necessity to protect the canal for all the uses for which it was intended, and to establish in the world the policy and power of America, for which the canal is being constructed. Exactly similar conditions were experienced by England in maintaining the Suez canal.

The United States, then, from this event must clearly recognize that it has changed its whole attitude to its own people and to the world. From a government of quiet peace, resting at home, alone, and sufficient unto itself, it graduates into a government interesting itself in the affairs of the world, it enters upon the theater of human action over the whole earth, and becomes at once the target for the assaults of its foes, while it places upon the American citizen the test as to whether he is ready to make the advance for the advantages to be obtained to the citizenship of his country, or prefers to relinquish these hopes to accept the security of the undisturbed present, with its prospect of supine peace and limited destiny.

The cutting of the Panama canal has made a gash in the side of the earth through which the to-morrows will run red with strange destinies for America.

The Law and the Panama Canal

BY FELIX J. KOCH

THERE are lawyers in legion who claim Uncle Sam is inconsistent, and there are newspaper men in legion, ever since the Interstate Commerce Commission went into existence and cut off the "passes" for scribes on the railways, who have joined in on the cry. For,—to select just one example out of the many,—Uncle Sam allows water transportation companies to issue all the passes they choose, and you can ride from Cincinnati to Newport, Kentucky, and on down the Ohio to Lawrenceburg, Indiana, gratis, any time you can get the favor from the river captains; where, if you went half the distance on a "pass" by rail, you'd land in prison and the issuing company would be heavily fined.

Behind all of which comes the question how the interstate commerce laws are going to be made to apply to our canal down in Panama, and whether American ships cannot legally claim a right to less tolls than the vessels of other flags.

In fact, Panama and the canal have given birth to studies in jurisprudence that would test the strength of mind of men like Marshall or Chase.

COLONEL GOETHALS
Directing the Work at Panama

Customs Duties.

Just for example, the laws relating to "customs," as they are popularly interpreted. According to the acts of Congress, the 10-mile strip, otherwise known as the Zone, is American soil, acquired by purchase, quite as much as is Alaska or is any section of the Gadsden or Louisiana purchases. You go down there, and you are under the flag.

On either side lies the baby Republic, —Panama,—foreign soil quite as much as is Russia or Afghanistan. But not one person in a thousand, in five thousand, probably, can tell just when they are in and when outside the zone, in the interior of the Isthmus. There are no customs barriers; folk come and go. You buy a Panama hat in Colon, and wear it on the hill at Ancon, and not a cent of duty. In other words, all our Zonites pay no duties for the million things they import. Now go down to Panama yourself; buy goods and trunk them. Before very long you'll come home to the states. When you get to New Orleans the customs officers search you, and you pay heavily for everything brought along. In other words, Uncle Sam's principle would amount to this,—that people in Florida can import what they will from Cuba, free of duty, because they are next neighbors,—but the rest of the nation

cannot. That is one of the nice legal technicalities of Panama, and one which the tourist armies that will invade the Isthmus when the canal is opened will undoubtedly resent.

Fortification.

Then there is that problem of fortification. It was not over a year or so ago that the press was discussing how J. Warren Kiefer, American Representative at the Brussels Inter-Parliamentary Congress, had raised a storm of protest when he declared that we could not fortify the Panama canal. He—and there are many other lawyers who had sided with him—was evidently under the impression that the first treaty with Great Britain had been ratified. Instead, for the very reason that it would not allow the United States to fortify the canal, it had been dropped, and a new one substituted in its place. This was the Hay-Pauncefote treaty, under the terms of which the canal can be properly protected.

Since then, the acquisition, by this country, of the territory on which the canal is built, dispels all question as to the right of the United States to fortify, and of the declared intention of the people of the United States to fortify their canal, and to insure its use at all times, during peace or war, to the fleets and navies of the United States.

On the steps of the headquarters building at Culebra, a group of us raised this same question, one day, with Colonel Goethals himself, and his reply was characteristic of the soldier canal builder:

"The President has said we have a right to fortify the canal,"—and thereon he based his work.

Someone in the crowd—they were newspaper men, all of them—put the question how he would do it.

And again the reply:—

"There's been a board on fortifications appointed, and this is for them to say."

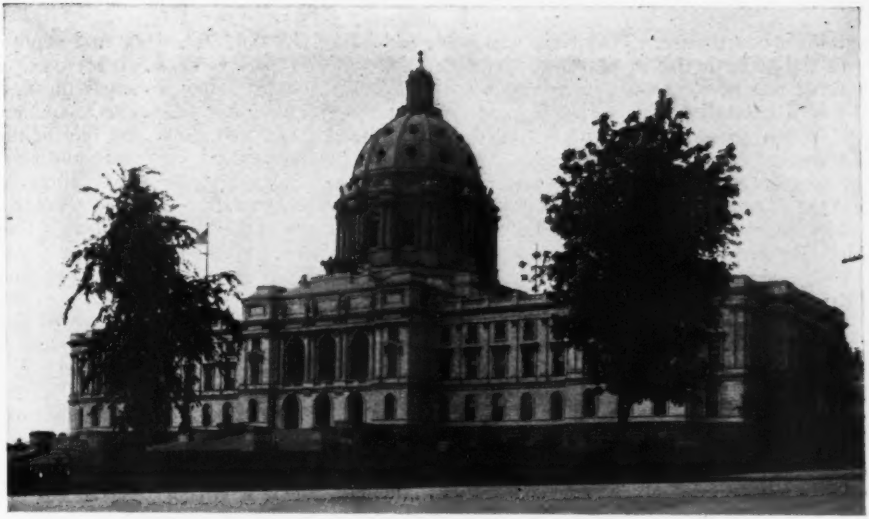
"The canal," he held, "was a question of military defense to the United States. Even if it never paid a cent,—it was necessary and worth while. Neither Fortress Monroe nor Mare Island yield a cent of revenue, and yet they have proved their worth."

Some of the things the canal viewed from war standpoints will do, are interesting. One of these is that it will put a limit to the maximum size of war ships. The present canal will be amply large to pass the largest ship in existence, but no nation hereafter would be so foolish as to build a ship too large to pass through the locks.

A number of those high in authority on the Isthmus seem to feel that if England has a war and is cut off from the East, where Japan is her great ally, she is coming through, treaty or no treaty, unless prevented. As things stand, we give equal rights through the canal to all warring nations; and, as a consequence, a number of the Congressmen were opposed to defending the canal, relying on nations to observe the neutrality of it. On the other hand, the Army engineers state that history teaches plainly that the power to regulate the use of the canal can only be maintained by having guns to enforce it, with batteries and forts at either entrance.

Military authorities are already calculating the invaluable aid the canal will be, in bringing warships rapidly from one coast to the other. Thus fewer war ships will be needed to protect the American coasts from invasion. It will be interesting to see how many such war ships, at $10,000,000 each, it will save. The cost of forty such would practically cover the cost of the canal. Recalling the voyage of the Oregon, one can readily see how the passage will increase the service value of each ship, as well as aid it in maintaining the Monroe Doctrine.

It would therefore seem that the defense of the canal is obvious. In fact, Uncle Sam has been going ahead with his plans for such defenses, and has appropriated $2,000,000 for that purpose. The Pauncefote agreement, it would seem, allows us to control our own canal. We have undoubtedly the chief interest in it, and we have the right to arrange for its protection.



THE STATE CAPITOL, MINNESOTA

The Supreme Court of Minnesota

BY GEORGE F. LONGSDORF

Of the St. Paul Bar.

THE judicial history of the supreme court of Minnesota begins with the following entry on the journal book of the court: "United States of America, Territory of Minnesota.—Be it remembered that at a term of the supreme court for the territory of Minnesota begun and held at the American House in the town of St. Paul (there being no courthouse at the capital of the territory), county of Ramsey, and territory of Minnesota, on the second Monday of January in the year of our Lord eighteen hundred and fifty, it being the fourteenth day of the month and in the year of the independence of the United States of America the seventy-third, it being the first term of the said court for said territory:

Present and presiding—

The Honorable Aaron Goodrich, Chief Justice,

The Honorable David Cooper, Associate Justice,

Henry L. Moss, United States District Attorney,

Lorenzo A. Babcock, Attorney General,

Henry L. Tilden, United States Deputy Marshal,

James K. Humphrey, Clerk,

Cornelius P. V. Lull, Sheriff."

The only proceedings had at this term were the admission of attorneys and the promulgation of rules for the "supreme, district and chancery courts" of the territory. The next term was convened on the 7th of July, 1851, at the Methodist Episcopal Church in the town of St. Paul, and the third term at the same place, there still being no courthouse available at the capital. Finally at the fourth term the town of St. Paul had grown to that civic dignity whereto per-

tains a courthouse. That term was held at the "courthouse in St. Paul," and the court was no longer dependent on a borrowed habitation.

When the first term was held there were in Minnesota 6,000 people. Sixty years later there were more than 2,000,000. There are lawyers now living in Minnesota whose manhood years span all that time, and who have seen and read every decision of the court while it was fresh in print. All of the decisions of the court were reported in six small volumes when the present chief justice came to join the bar of the state, and there are now one hundred and fourteen volumes. The significance of this is not merely statistical, for there are other states like it in this respect. It signifies a body of law derived from the safe and sure experience afforded by the precedents, and yet so rapidly developed that there is almost a conscious molding of it into a systematic whole. The decisions were made in the light of the full experience of the older commonwealths; the conditions that should in future affect and be affected by the decisions were foreseen at closer range, they were fitted to the times better than those that spread over a long period of time; the judges who composed the court came from various states, and lent to their work the tempering equations of their native communities. The influence of New York was doubtless the greatest of all the states on the forming of the judicial doctrines and institutions of Minnesota, and that of Massachusetts was next; but neither of these influences was altogether direct. They were transmitted through Michigan, Wisconsin, and, to some extent, Iowa. Other states, too, had their share. So that Minnesota case law is a composite of the best in the older states, and the same is true of other western states whose courts were contemporaneous with that of Minnesota.

The first case of any kind before the court was Gervais v. Powers, on a motion to dismiss a writ of error. It was overruled, and the case was saved to be decided on the merits, though that availed the plaintiff in error nothing, because a judgment of affirmance followed (1 Minn. 45, Gil. 30). The first reported case is Desnoyer v. L'Hereux, 1 Minn. 1, Gil. 1, and it also was the first one heard by the court. The frequency with which French names are met in the early reports, and Scandinavian and German ones in the later, tells something of the settlement of the state. Very early preparations were made for reporting the decisions. William Hollinshead was appointed reporter by an order dated July 7th, 1851, and the publication of the reports was ordered on July 26th of the next year. On the journal of the court for January 23d and 24th, 1853, appear the orders admitting to practise in the courts of the territory Aaron Goodrich and David Cooper, who were the justices of the first court. It is not apparent why this was necessary, unless it was to get their names on the roll of attorneys, which seems at this day to have been a rather useless formality.

The first session of the state supreme court was held in the court room at the capitol in St. Paul on July 5th, 1858. It is now housed in the east wing of the new capitol, in a room of classic architecture, sparingly decorated except for a series of mural paintings by the late John LaFarge. These paintings are symbolical of the growth and science of the law. They depict moral and divine law, represented by Moses receiving the Decalogue on Sinia; the recording of precedents, represented by Confucius and his disciples; the relation of the individual to the state, represented by Socrates and the sons of Cephalus; and the adjustment of controversies, represented by Count Raymond of Toulouse and the Cardinal. Back of the court room is the consultation room of the court, a copy of the signers' room in Independence Hall. On the right is the library of the supreme court, commonly referred to as the "state library," and on the left are ranged the chambers of the justices and the clerk's office. Two terms are held in each year, April and October.

The subjects of litigation in Minnesota cover a very unusual diversity. Within the state are great forests and mines, large agricultural regions, great centers of rail and water commerce, thousands of lakes and many water pow-

Consulation Room

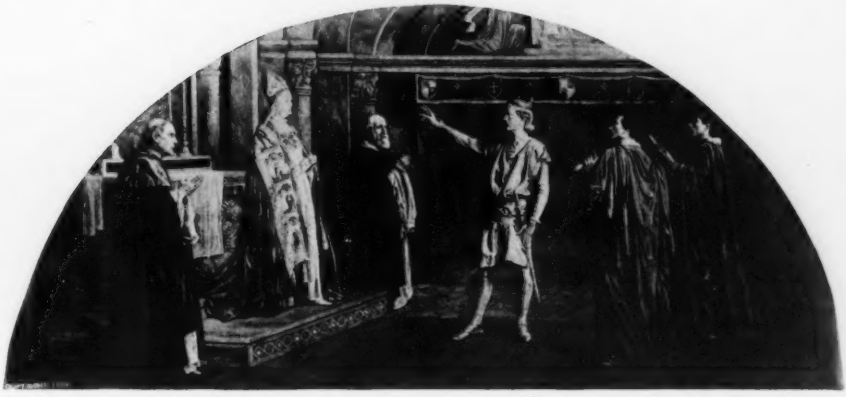
Photo by Ingersoll

ers. There are swamp areas making difficult questions of drainage. A few cases may properly be mentioned as illustrative, also because they have been of more than local importance. One of the early cases was Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82, Gil. 59, 88 Am. Dec. 59. This held that the patentee of a government fraction bounding on a meandered navigable river took to the channel, including islands, and subject only to the public right of navigation, and that the meander line was not the limit. This was affirmed in 7 Wall. 272, 19 L. ed. 74, and is a leading case. Another leading case often cited is Cahill v. Eastman, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184. A water power tunnel having been driven under the bed of St. Anthony Falls developed more water power than even solid rock could withstand, for the water broke through into the tunnel prematurely and was carried down under plaintiff's land breaking it up and undermining it. The constructor of the tunnel was held liable, though he had taken all possible care, and could not have foreseen the result. This case followed the great English case of Rylands v. Fletcher, L. R. 3 H. L. 330, 1 Eng. Rul. Cas. 235, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, only a few years and worked out the same doctrine. A little later the court rendered the celebrated Turntable Case (Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393), one of the first on this subject. It is a leading case cited many times and of unabated force as a rule of decision, notwithstanding several disapprovals have been expressed, seemingly in misapprehension of its meaning. It was decided on the assumed fact as pleaded that the turntable was an insufficiently guarded "dangerous thing attractive to children." There was no decision that it was in law a dangerous attractive thing which there was a duty to guard. One of the very important cases decided by the court was the State Railroad Bond Case (State ex rel. Hahn v. Young, 29 Minn. 474, 9 N. W. 737). This was argued by a number of the leading members of the bar of Minnesota. It arose out of the fact that certain railroad aid bonds were delivered without the road having been built or completed. The legislature submitted an amendment to the Constitution of the state, by which the levy of taxes to pay the obligations of the state was commanded, but no tax for the pay-

RELATION OF THE INDIVIDUAL TO THE STATE
(Socrates and the Sons of Cephalus)

ment of principal or interest on the state railroad bonds was to take effect till it had been submitted to and ratified by the voters. This was assailed as impairing the obligation of the contract contained in the bonds. Chief Justice Gilfillan wrote the opinion establishing the rule that a contract by the state has a legal obligation protected against impairment though it is not enforceable by any judicial remedy; and accordingly the amendment was void. This opinion was declared by another and earlier member of the court to "stand forth pre-eminent" from the decisions of American courts, and to rank in ability and force with the great constitutional opinions of Marshall. Another associate, William Mitchell, said that the presence of Chief Justice Gilfillan on the bench was "one of the chief inducements" which led him to accept an appointment to that bench.

Still another case is deserving of mention because it is the product of a local difficulty not unknown in other parts of the nation. That is the case of Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632. Herein was reaffirmed the law of the state as laid down in the earlier decisions, rejecting both the common-law rule and the civil-law rule as to surface waters, and adopting a rule that the owner draining off surface water must not unnecessarily injure another. Like other innovations, this was attacked and was said to work towards confusion. Nevertheless the rule has stuck, and it is doubtful whether any other would work at all in Minnesota. The trust fund doctrine as to corporate assets was under consideration in Hospes v. Northwestern Mfg. & Car Co. 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117, 15 L.R.A. 470, and was criticized and greatly restricted in an able and characteristic opinion pointing out fraud as the basis of the rule. This opinion was by Judge Mitchell, who also wrote the opinion in the case of Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L.R.A. 337. In the latter case the legality of a trade agreement among retailers not to deal with a wholesaler who sold at retail in competition with them was sustained; and it was said "this subject is likely to be one of the most difficult and important which will confront the courts during the next quarter of a century." But the writer wisely proceeded to decide the case presented, without venturing into "whatever doubts and difficulties may arise in other cases." A late case arising in the iron-mining region of the state brought up the question whether the making of a lease of the right to mine iron on state lands was invalid under the state Constitution, which for-



ADJUSTMENT OF CONFLICTING INTERESTS
(Count Raymond of Toulouse and the Cardinal)

bids the sale of such lands otherwise than at public sale. In an opinion (State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 A. & E. Ann. Cas. 520) by Chief Justice Start, it was held that a mining lease, neither in present practice nor in legal history, has any of the qualities of a sale of land, and for that reason was not within the prohibition. It has been supposed that the royalties to the state arising from leases of this kind will ultimately amount to $100,000,000. One more case having to do with natural resources may be cited. In the state are vast water powers. It was proposed to condemn by right of eminent domain the right to establish a dam and to divert water on the Rainy river, and a corporation was formed to sell power "from the wheels" of the plant. In this case, Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638, 7 A. & E. Ann. Cas. 1182, the sale of power from the wheels was held not to be a public use, because the physical restrictions on the distribution of the power limited the benefits to too few users to be public. The generation of electric power, on the other hand, was said to be a public use, if for general sale, because of the physical adaptability of it to general distribution.

Many other equally typical cases might be cited, but that would be trenching on the field of the digester or the annotator. And the reports have been recently digested and also elaborately "extra annotated" with citation notes, to which publications the curious and the incredulous are referred for full information.

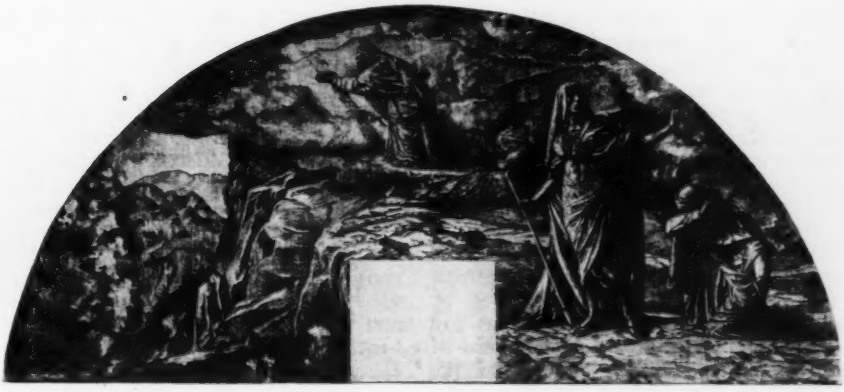
The library of the supreme court, already referred to, is very full and complete. It comprises at the present somewhat over 65,000 law and documentary works. All the American, English, Canadian, Scotch, Irish, and Australian reports are on the shelves, except a very few reports of minor courts. The documentary library comprises public documents of the United States, of the several states, and of the Dominion of Canada, with many other miscellaneous publications properly belonging to such a library. The collection of Session Laws of the various states is notably good and the text-book library includes every treatise of any importance in America, as well as most of the English works which have been circulated in this country. The library is supported by legislative appropriation, and is rapidly outgrowing its quarters, though they were not many years since provided in the new capitol. It has been suggested that a new building be erected adjacent to the capitol, to be used as a supreme court building, and the suggestion is not unlikely to be followed out by the legislature at no distant time.

RECORDING OF PRECEDENTS

(Confucius and his Disciples)

In its sixty years of existence, the court has had many men of notable ability upon the bench. In the territorial court, which first sat in 1849, there were during the life of the court ten justices. Four of these occupied the chief justice's chair. One of the justices, R. R. Nelson, afterwards became United States district judge for Minnesota and served for many years as such. Another justice, Charles E. Flandrau, became a member of the first bench of the Supreme Court of the state of Minnesota, and after his retirement, in 1864, was for many years one of the leaders of the Minnesota bar.

Of the state supreme court there have been six incumbents of the office of chief justice and twenty-four of that of associate justice. The chief justices were Lafayette Emmett, Thomas Wilson, James Gilfillan, Christopher G. Ripley, S. J. R. McMillan, and Charles M. Start. Among the associates who sat on this bench, William Mitchell was unquestionably the most renowned. Opinions written by him have been cited by every court, and opinions by him may be found on most of the questions of law that ordinarily would arise. Within the time of his service 8930 cases were on the calendar of the court, and he must have written over 1,600 judicial opinions, one every three working days during the time of his service. Yet such was the quality of his work that an eminent jurist wrote of him that he was the peer of any lawyer on any American bench. By the vicissitudes of politics, or rather the littleness of politicians, he failed of re-election in his latter days, but his defeat was in no way to the discredit of those who were chosen for the bench. Of the opinions mentioned herein, he wrote Sheehan v. Flynn, Hospes v. Northwestern Mfg. & Car Co. and Bohn Mfg. Co. v. Hollis. Judge Mitchell was born of Scotch parents, in Canada, was educated at Washington and Jefferson College, in Pennsylvania, studied law and was admitted in Virginia, and lived in Minnesota. Neither of these racial and geographical facts was a necessary factor in his greatness, but probably each of them was influential in his life. Before his elevation to the supreme bench, he was a nisi prius judge, and as such he served with ability and note, and from which experience much of his very practical ability as a reviewing judge was drawn. As lawyer and judge he served in Minnesota from 1857 to 1900. Of him it was written by Justice Jaggard, later of the same court: "He was free from the inertia of accepted theories; he was subject to neither bucolic nor metropolitan predispositions. . . . In consequence his decisions were the result of the most thorough investigation of the law of all the states. . . . They register a



MORAL AND DIVINE LAW

(Moses Receiving Decalogue on Sinai)

deliberate and conscious effort to bring about, as far as could be, a uniformity of decisions between the various states."

A predecessor on the bench, a neighbor in Winona, and an intimate friend of Judge Mitchell, was Chief Justice Thomas Wilson. His service on the supreme bench was five years, after which he returned to active practice, and continued therein till 1910, when he died. But a few months before his death he appeared as general counsel for one of the great railroads in the court of which he had been the chief over forty years before.

James Gilfillan, colleague and peer of Mitchell, was another of the justices who had a long service on the bench, distinguished by eminent ability and abundant labors. His service was approximately twenty years. It was exceeded in length by that of John M. Berry, his contemporary, who served for twenty-three years.

All of these judges served through the formative period of the jurisprudence of the state, and helped to bring it to that uniformity and accord with the best authorities of which Justice Jaggard wrote in eulogy of Justice Mitchell. What was there written might truly have been written of the court. It had all of the experience and all the precedents of the older states and England to guide it in forming the doctrines that should prevail in the new state. It had foresight. In fact the West was built by people who had the foresight of great commonwealths in the Mississippi valley. Many of them, like these judges, lived to see in reality and accomplished the vision that drew them here. They lived to shape as they had planned, and so did these judges. And they turned over complete in one generation all the substantial fabric of a complete and law perfect state. The different, and not less difficult, work of applying the settled laws, has fallen upon the present court and its immediate predecessors. It, too, has novel questions, but of a class not different from older states, not formative so much as definitive questions. Witness the cases of State v. Evans and Minnesota Canal & Power Co. v. Koochiching Co. The court at the time this is written is composed of Chief Justice Start and Associate Justices Brown, Lewis, Simpson, and Bunn. In 1912 Justice Philip E. Brown is to assume a seat on the bench.

The chief justice, who is also the dean of the court by years of service, is Charles M. Start. Native to Vermont, he came to Minnesota in 1863 after service as an officer in the Union army. From that time he has been lawyer and judge in this state. He had a long practical experience as county attorney, as attorney general, and as district judge

before he went on the bench of the supreme court in 1895. Contemporary with the founders and formers of the law of the state, and successor on the district bench to Justice Mitchell, he brings their spirit and traditions to the application of the law in the questions of to-day. His knowledge and memory of the case law of the court is very intimate, and questions from the bench to the counsel are apt to occur if there is any inaccuracy in citation of authorities. The chief justice is much beloved by those who know him best, and has had the generous and almost filial regard of his associates and the officers of the court. To hear him spoken of as "The Chief" is of daily occurrence about the capitol, but it is always in a tone of respect and esteem. He resides at Rochester.

Associate Justice Calvin L. Brown, native of New Hampshire, has resided nearly all of his life in Minnesota and was admitted to the bar in 1876. He was a district judge from 1887 to 1900, when he was appointed to his present position. He resides at Morris.

Associate Justice Charles L. Lewis, native of Illinois and resident of Duluth at the present time, came to Minnesota in 1880, was district judge from 1893 to 1895 and from then to the present time has held his judgeship on the supreme bench, from which he will retire in January, 1912. He was educated at Oberlin and University of Chicago.

Associate Justice David F. Simpson, of Minneapolis, is a native of Wisconsin, and a graduate of the University of Wisconsin and of the Columbia Law School. He was sometime city attorney of Minneapolis, and has been in judicial service on the district bench since 1896, till his elevation to the supreme bench in 1911. He has recently resigned.

Associate Justice George L. Bunn, of St. Paul, is the only democratic member of the bench. He is a citizen of St. Paul, where he was on the district bench from 1897 until his appointment to succeed the late Justice Edwin A. Jaggard, in the fore part of 1911. This appointment was by a republican governor, and was strongly approved by many citizens who desire a return to the former bipartisan composition of the court, as in the time of Justice Mitchell. An obituary of Justice Jaggard, who preceded Justice Bunn, appeared in CASE and COMMENT of April, 1911. Justice Bunn is a graduate of Wisconsin and a native of that state.

Associate Justice Philip E. Brown, of Luverne, is also a native of Wisconsin, and graduate of the University of Wisconsin and of the Albany Law School. He has been a district judge since 1891, and will assume the seat on the supreme bench, to be vacated by Justice Lewis in January, 1912.

Associate Justice Andrew Holt, of Minneapolis, will assume the seat vacated by Justice Simpson, on the latter's resignation, recently tendered. Justice Holt is a native of Minnesota and a graduate of the University of Minnesota. He has been eighteen years in judicial service in Minneapolis, latterly as one of the district judges.

By the Constitution of Minnesota the membership of the court is limited to five. The calendar at each of the two terms will average near 240 cases, and the annual allotment of opinions to each member of the court to about one hundred. Realizing that this is a very great burden and larger than should be borne, there has been some discussion among the lawyers of the state, looking towards either an increase in the number of justices or a restriction on the right of appeal. One or the other must be done at some time not very distant in the future.

It may be unnecessary or even presumptuous to lay praise on a court, for it is supposed to be insensible alike to flattery and to scolding, but since a court is subject to fair criticism it is entitled to fair credit; and this court has earned these credits. It has judged faithfully, and wisely and efficiently. It is a courteous bench. It is industrious. It is prompt in decision. It is seldom criticized or scolded. It possesses the general confidence of the state. Moreover, to quote one of its members, "Our record is there in the books, and we must stand on that."

Correspondence

Saved the Term.

Editor CASE AND COMMENT:—

I thought that the experience of the members of the bar at this place during the inundation might find some place in your publication, and be of interest to your readers.

Our town has been inundated by the floods from the Mississippi river, water standing in its streets, alleys, and houses, all the way from 3 feet to 10 feet deep.

Yesterday (April 15th) was the day set by law for the opening of the spring term of our chancery court, and the chancellor resides at a town 30 miles distant. Being practically cut off from railroad communication for a distance of 5 or 6 miles, I advised with the chancellor that it would be impracticable for him to attempt the trip, but, being desirous of saving the term, we concluded to elect a special chancellor to preside and adjourn the court.

Accordingly on to-day (second day of the term), the day fixed by the Constitution, two members of the bar, with myself, the sheriff of the county, and clerk of the court already residing in the courthouse, went to the court in boats in the face of a driving rain, an election was held, special chancellor was elected, and court proclaimed in due form of law. After disposing of some few minor matters, the term was then adjourned until the first Monday in July, 1912.

The court room proper presented anything but a judicial appearance, for furniture of all kinds belonging to citizens, including that of the courthouse officials, was stored about and overhead in promiscuous profusion; in adjacent rooms the good ladies were performing their usual household duties, while from the windows of the building could be seen the murky waters of the great Mississippi, with all sorts of small craft plying their way along the streets.

J. BERNHARDT.

Arkansas City, Ark.

The Recall Again.

Editor CASE AND COMMENT:—

In the issue of your May journal I noticed an article "The Recall—By One Recalled." The author says he is in favor of the recall if it is a recall to his liking. He then propounds the two questions, "Shall we retire a judge because he honestly decides that the law is what we do not believe to be the law? Or, shall we make it because he has dishonestly accepted a bribe in rendering his decision?"

The writer implies the recall should be based upon the latter proposition,—the one of bribe taking. He, however, fails to tell us how we are to determine that the judge has been bribed. He fails to seemingly understand that in ninety-nine cases out of every one hundred (where bribery exists), the only indication of bribery is in the decision itself; and that the decisions apparently are made by the judges in all honesty and candor, when in fact the decisions were prepared and typewritten by some corporation attorney in the quiet precincts of his law office. Will the writer then please explain how we may know that certain decisions are rendered because the judges delivering them have been bribed, and how we will know when other decisions are decided honestly, though contrary to our belief as to what the law really is?

The writer then tries to "take a slap" at Mr. Roosevelt's "Recall of Judicial Decisions," asserting that it partakes more of anarchy than of anything else. It seems to me that most persons who criticise Mr. Roosevelt's "Recall of Judicial Decisions" seem to do so from a misunderstanding of what Col. Roosevelt's Recall really means. As I understand the proposition, the recall of judicial decisions was not intended to apply to civil cases between man and man, but was merely to apply to constitutional questions; and in the event the court decided that a legislative enactment is unconstitutional, the question should be submitted to the people as to whether such acts were in accordance with the Constitution, or whether the court had rightly decided that it was contrary to the Constitution. I see nothing in such a proposition that would, to me, seem in the slightest to be anarchistic. The Constitution is the direct work of the people; they are its makers. Why, then, should they not in the last resort be its interpreter?

The writer says this would be another method of amending the Constitution, but I fail to see it so; it is merely a new method of saying what the Constitution is,—what it really means. We have been used for so many years to having the courts and attorneys tell us what everything means that we have almost come to believe that we, the people, are entirely incompetent to think or act for ourselves. However, we are coming to realize, unless we, as a people, begin to think and act for ourselves, that the liberties of which we so proudly boast will be taken from us, because we fail to assert our right to them.

I believe with the writer of the article referred to, that what this country needs is "not a few" (but many) men broad enough to discern the rights of both capital and labor. What we need is to have the wage earner realize that without capital he would be without employment; that capital is a necessity; that persons and corporations having large investments and employing many men have certain rights which should be respected. On the other hand, capitalists should know and realize

that even though they have their millions, without the laborer, they cannot put their capital to use; that upon the laborer depend their interest, their dividends, and the safety of their investments. Persons, as well as corporations, with large capital, must be made to know that laborers also have certain rights which must be recognized and secured to them by their employers; they must be made to know that the laborer is a human being; that he has the same appetite, the same emotions, and the same desires as his employer; that the laborer is more than a piece of machinery, and that he has a right to such proportionate share of the products of his toil as will enable him to procure for himself and those dependent upon him their proportionate share of the joys of this life.

Our judges should all be such broad-minded men, and when by chance or otherwise any person is placed upon the bench whose decisions do not acknowledge the rights of the employer and the employee alike; whose decisions favor one class regardless of the rights of the other, such judge should be speedily recalled, and if, while on the bench, he has made a decision which has annulled a wholesome law, because it was declared unconstitutional, the people should have a right to recall such decision

L. D. HILL.

Bowling Green, O.

The Single Tax.

Editor CASE AND COMMENT:—

What in the name of common sense does James Wilkinson want with his letter on The Single Tax in your last issue? We Single Taxers propose a Single Tax on land values and not on land. If he will refer to my letter, he will see that I say "tax the value of land." The difference is that only land having value will pay tax and not land itself. The idea is that the value of land is created by the community and not by the labor of its owner. If its owner never did a "lick of work," its value would still increase. Its owner might be on another continent, and its value would remain and increase unaffected by his presence or absence. It is a community produced value, and so should go for community needs, to wit: taxes. What I produce, is mine. What you produce, is yours. What we produce, is ours. Is there anything wrong with that proposition? And just as it would be wrong for me to appropriate what you produced, so it is equally wrong for anyone of us to appropriate what all of us produce together. What all of us produce together should go for what all of us need together.

Under the Single Tax, it would pay to use land, instead of merely holding it as now for speculative purposes. No one but the speculator gains in the one instance. All others are robbed in just as much as he gains. For what he gains must come out of the pockets of others. He does not earn it any more than the gambler earns his loot. By the use of land, all gain. Creating additional opportunities for labor, it raises the price of labor. Creating more products as it does, it lowers the price of products. High wages, and low cost of products are desirable.

Suppose a new continent were discovered, would it not benefit all? The same effect would be produced by the operation of the Single Tax. By forcing so much land into use, it would practically add a continent of land to the world to aid in the production of more food, clothing, etc., and give employment to all those seeking it. Could that be anything else but a benefit?

Whether you call it the Single Tax or anything else does not matter. Call it anything you please. The essential thing is to free land to use, and not to speculation; to tax its value created by the public, into the public pockets.

The private appropriation of land value is as wrong morally as slavery. If Mr. Wilkinson cannot reason it out himself, he may refer to Spencer whom he quotes, and he will find that Spencer condemns private property in land. See Social Statics, Unabridged Edition, Chapter IX. Also Justice, Sec. 54. Right of Property. After you have read these chapters, will you kindly let me know whether they too are "isolated quotations which may seem to prove what the book is endeavoring to refute."

I can not answer the rest of Mr. Wilkinson's letter, as frankly I do not understand it. Perhaps it is due to my lack of knowledge of English. As a general proposition, however, I will say that I doubt the truth of any argument that needs such a maze of words to express the thought. Truth is never complex, but simple. And when I had read the letter several times in a vain endeavor to follow the thought, I realized the beauty of the following advice: "In promulgating your esoteric cogitations, and the philosophical observations, beware of platitudinous ponderosity. Let your communications possess a clarified conciseness, a compacted comprehensibleness, coalescent consistency, and a concatenated cogency. Eschew all conglomerations of flatulent garrulity, jejune bablement, and assinine affectation. But let your extemporaneous descanting, and unpremeditated expatiation have intelligibility; and sedulously avoid all pollysyllabic profundity, pompous proclivity, psittaceous vacuity, ventriloquial bombasity, and vaniloquent vapidity. In other words, talk plainly, and don't use big words," and I will be able to follow you.

L. B. SCHWARTZ.

St. Paul, Minn.

The Judiciary.

Editor CASE AND COMMENT:—

In reading the statutes cited on p. 657 of the April number of "CASE AND COMMENT," the writer is reminded of a recent case wherein he was informed that a receiver appointed by a certain Federal Judge, (not in Colorado), was the son-in-law of the judge by whom the appointment was made.

Perhaps this does not violate the letter of the statutes cited but is at least a commentary upon the remarks made by the author of the article.

CHARLES E. WALDO.

Canon City, Colo.

Editorial Comment

"The primal duties shine aloft like stars."—Wordsworth.

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Edited by Asa W. Russell.

The Law of the Sea

THE ship is sinking! "Women and children first to the lifeboats." This is the law of the sea. You will not find it written in any human code or recorded in any statute. It has never been announced by any judge. Admiralty has never declared it. No court ever construed it. It is simply a splendid marine tradition which rests upon the elemental and instinctive. It is the answer which a brave man makes to the challenge of Death. The deeps without call to the deeps within and they respond. Immortality speaks to Eternity.

The story of the tragedy of the Titanic is familiar to the world. The largest steamship ever constructed—heralded as the peerless queen of the seas—was speeding to port through the night watches on her trial trip. Across her path drifted a ghostly, mist-bannered fleet, launched from the icy ways of the North by primeval forces. More terrible than Dreadnoughts, they held their unchartered course, and at a touch shattered that great ship which was to have been man's defiance of the sea.

In that moment all artificial distinctions vanished. The precedence accorded wealth or position was no more. Moral and racial instinct dominated. Men of all creeds and no creed instinctively adhered to a divine standard of conduct.

There stood a man whom Fortune had made master of many millions. He aided others, unmindful of himself. Colonel Astor going into action with his battery at San Juan was not nearly so heroic a figure as when he stood on the sloping decks of the sinking liner, hemmed in by the darkness of the night and the sweep of icy seas,—without a fighting chance.

There was Major Butt, a son of the chivalric South, who nobly upheld the honor of the Army. He stood calmly at the rail, with uncovered head, looking across the waste of waters as one who salutes Death.

There stood William T. Stead, a man of letters, who had deeply influenced the thought of his time; and Henry B. Harris, the famous playwright, suddenly called to act a part in this grim tragedy of the sea; and the noble and philanthropic Isidor Straus, and light-hearted Benjamin Guggenheim, attired, as were others, in evening dress, who could jest with Fate and say: "If we are going to call on Neptune, we will go dressed as gentlemen."

There was splendid courage everywhere. When the crash occurred a stewardess gathered the thirty little pages together and marched them to the deck, where they were addressed by an officer. He told them that they were sailors, and that they must take their chances with their vessel. Without a murmur they marched back to their posts and awaited their fate. The captain and first officer went down with the ship. Most of the crew died at their posts. The musicians sent air after air throbbing across the ocean swell like the death chant of a Viking.

There were heroines too, — such women as Mrs. Isidor Straus and Mrs. Allison,—who sought to write a new law upon the face of the waters by saying: "If our men must stay, we will stay with them."

How shall we account for these scenes of noble self-sacrifice, so foreign to the spirit which dominates our social life? Is it not that these men and women and youths were heirs of the ages; that enshrined within them were the ennobling traditions of the past, the inspirations of the present, and the aspirations of the future? That awful crisis revealed the soul of the race. It is inconceivable that men sprung from a lineage on which has rested the romance of Chivalry and the halo of Christianity should be ruled in the ultimate by any other law than that of love, altruism, and self-denial. No epic possesses the sublimity of the simple immemorial law of the sea: "Women and child first." It is history and prophecy.

Government Ownership

THE carrying of the mails has long been recognized as a public function. Now it is proposed to amplify the postal system so that it will include a parcels post and a postal telegraph. It is urged that we ought to expand the service so that it may carry bigger things and may transmit our communications more quickly. It is said that we have permitted private corporations to perform two thirds of the functions of the mail system, and that these broad fields of public service ought to be reclaimed. It is pointed out that almost every civilized nation except our own operates its own telegraph system as a branch of the post-office department.

Postal Telegraphs.

The government ownership plan was brought prominently before the country at the beginning of the current session of Congress, by Postmaster General Hitchcock's recommendation that the government proceed to acquire the properties of the American telegraph companies. Since that time it has been persistently urged by the so-called progressive members of both political parties. It is said that no large outlay in buildings would be required, and that the additional employees would not constitute a prohibitive item of expense. It is argued that the telegraph could be operated at reasonable profit, and at the same time give service rates far lower than those now imposed. From telegraph profits, it is said, the mail service might be bettered, lower postage rates provided, and the danger of a postal deficit removed.

A natural sequence to the nationalization of telegraphs would be the government control of the long distance telephone.

The question is complicated by the rapid advance of wireless telegraphy. Its value has been long since demonstrated. Practically every vessel in the navies of the great nations now has this equipment, and hundreds of mercantile craft carry it. Many improvements have been made generally in wireless apparatus. Steel towers 450 feet high, to be constructed at Fort Myer, Washington, District of Columbia, as the land base of the naval system, will give a radius of at least 1,500 miles. From a tower 600 feet high, to be erected at Arlington, the Navy Department counts upon a radius of communication of 3,000 miles. Last summer it was reported that wireless signals emanating from Japan had been picked up on the California coast.

The possibilities of Marconi's great invention are such that in a few years it may supersede the methods of communication now in common use, and ren-

der them worthless to the government or to anyone else.

Parcels Post Plans

A parcels post is usually understood to mean a government express business carrying packages of a maximum weight of 11 pounds, at a flat rate per pound.

A parcels express usually means, literally, a government express business in connection with the Postoffice Department, carrying packages up to a maximum weight of 100 pounds, which is the minimum weight charged for in freight shipments.

Aside from the Goeke express bill, two general classes of bills have been introduced and are now before Congress. One class of these bills provides for flat rates,—that is, the same rates for parcels of the same weight for any distance, long or short. The other class provides for rates according to what is called the zone system,—that is, where the rates increase according to the distance.

It must be apparent to anyone who studies the question that the government is the only agent that can give the country a universal service of this character. The government now has established mail routes into every nook and corner of the country, ready for immediate service in small packages, which can be gradually developed, as the rural mail delivery system was developed, as the demand increases.

Nearly all of the civilized countries have worked out the economic question of the transportation of the small package, and are giving to their citizens the advantage of a very low rate. In other words, they have engaged in the express business under national supervision, and carry and deliver the small package as mail.

This system gives a rapid and cheap transportation both from the farm and factory to the consumer.

The present agitation of the parcels post system is indirectly chargeable to the fact that parcels can be sent to foreign countries under the international union agreements at a rate of 12 cents per pound up to 11 pounds, while it costs the people of our nation 16 cents per pound to mail a parcel weighing not more than 4 pounds to any point within the United States. This discrimination is unjust, and is more frequently used as an illustration in favor of a parcels post system within the United States than any other argument that can be produced.

The advocates of general unlimited parcels post have insisted at this session —as they have at other sessions—that the rate on fourth class matter (merchandise) was at one time 8 cents a pound, with no loss of revenue, but an increase of revenue; that the zone system of transportation charges used by the express companies is unnecessary and cumbersome; that the express companies pay wheelage to the railroads and divide profits and still make annually colossal profits at the expense of the people; that the people ought to have the freest possible use of the mails; and that the government will make much money besides benefiting everybody concerned, by putting in a parcels post system.

The opponents, on the other hand, insist that parcels post will tend to concentrate business in the large cities, thus injuring the small towns and the country; that it would create a deficit in the Postoffice Department; that it discriminates against the country merchant, and favors the great retail mail-order houses. As the committee's report sums up the case: "The most of people living in the country and engaged in agriculture and other pursuits, so far as we can secure information, and the larger mercantile establishments in the great cities, favor an unlimited parcels post law. The country merchant and nearly all merchants of the smaller towns and cities oppose the law. This seems to be the alignment. Self-interest, the mainspring of most of our actions, seems to be commanding in both factions. We do not think that the advantages claimed for the establishment of this post will be so great as its ultra friends claim, nor that the disadvantages would be nearly so great as its enemies fear."

It has been earnestly urged that the government establish a postal express, and by purchase or condemnation take over the business and property of the express companies to the extent neces-

sary for this purpose. It is estimated that the total value of these properties, so far as the government need acquire them, is less than forty million dollars. If we advance in this direction, where shall we stop? It is evident that this would be a long step toward national socialism. Further, that the ownership of all railroads would be a very natural and logical consequence of the ownership of the express companies, and, in fact, of all properties used in the transportation of commodities and persons, and in communication between different parts of the country. It would open the way to national ownership of not only coal mines, but all mines of every kind, and the nationalization of all lands might then be expected.

Uncle Sam's Railroad

Says Mr. John L. Mathews: "For nearly seven years, the United States has owned and operated an important commercial railroad, almost unnoticed by the public press and with little comment from the public. The roar made by the construction of the Panama Canal, the enormous appropriations, the tremendous rapidity of work, the magnificent system, have deafened the ears of the nation to the reports of the Panama Railroad and Steamship Company, and left us with a notion that the tracks on the Isthmus are used for nothing but dump cars and for carrying commissary stores.

"Nothing could be farther from the fact; for, in the seven years of government operation, the Panama Railroad has gone through a remarkable evolution as a commercial carrier; has passed through defeat to victory; has advanced to a remarkable degree as a competitor with the transcontinental railroads, and, in spite of poor equipment, poor docks, lack of storage, ineffective stevedores, and the congestion due to the Canal construction, has demonstrated some remarkable benefits accruing from government control. Above all things it has, thanks to action taken by Mr. Taft as Secretary of War under President Roosevelt, become a free road, which it had never been before in history; and open competition is for the first time existent across the Isthmus. The result is naturally a tremendous stimulus to trade, until the capacity of the terminals is far overtaxed."

Alaska

That the Federal government should own and construct all railroads in Alaska, and should control all of the national resources of that territory, is advocated by Senator La Follette, of Wisconsin. He suggests the creation of a board of public works for Alaska, similar to the isthmian canal commission, to be appointed by the President, which shall construct and acquire all railroads in Alaska, and establish in that territory a policy of government ownership.

. . . . . .

We are living in a period of transition. Great problems involving social readjustment are pressing upon us. At no time in the history of the Republic has there been a greater need for constructive statesmanship. It is impossible to foretell what policy will be evolved from the myriad suggestions, the conflict of opinions, and the clash of interests that mark the present day.

North Dakota's Code

COMMUNICATIONS received from several attorneys in North Dakota inform us that the statement made in the article appearing on page 725 of the May number of CASE AND COMMENT, that "the maximum penalty for rape in North Dakota is imprisonment for five years," is inaccurate. Under the statute which has been in force in that state for many years, the minimum penalty for rape in the first degree is ten years, and the minimum penalty for rape in the second degree is five years. There is no maximum penalty, hence life imprisonment could be inflicted in both cases.

The author of the article obtained his information from a presumably reliable source,—the United States Census of 1890.

"We profess to be ruled by precedents, but from the very vastness of their number we rely rather on the rapid and constant inter-change of opinion,—of 'persuasive authority'—from state to state, from text-writer to Judge."

Recent U. S. Supreme Court Decisions Affecting Interstate Commerce

During the present term of the Supreme Court of the United States, two highly important Federal enactments regulating railway carriers engaged in interstate commerce have been declared constitutional. These are the employers' liability act, sustained in Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, Adv. S. U. S. 1911, p. 169, 56 L. ed. —, 32 Sup. Ct. Rep. 169, and the safety appliance act, upheld in Southern R. Co. v. United States, 222 U. S. 20, Adv. S. U. S. 1911, p. 2, 56 L. ed. —, 32 Sup. Ct. Rep. 2, and applied to cars used in moving intrastate traffic on a railway which is a highway of interstate commerce. Both of these decisions might have been expected, in view of the expression of opinion of the different justices in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, in which the earlier employers' liability act was held invalid because it was not confined to employees engaged in interstate commerce, and of the repeated enforcement of the safety appliance act without questioning its validity.

In several cases the action of the Interstate Commerce Commission has been reviewed. Thus, in Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. —, Adv. S. U. S. 1911, p. 436, 56 L. ed. —, 32 Sup. Ct. Rep. 436, the action of the Commission in prescribing a uniform system of accounting and bookkeeping for carriers by water upon the Great Lakes, and in calling for annual reports from such carriers, was upheld, although such accounting system and reports were not limited to joint rail and water business, but were required to embrace as well the other business of the carriers, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks. And in Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, Adv. S. U. S. 1911, p. 108, 56 L. ed. —, 32 Sup. Ct. Rep. 108, it was held that a judicial review of the facts upon which the Commission based its order reducing rates was limited to a determination of the question whether or not there was substantial evidence to sustain the order. The Commission's order in this case reduced rates on lumber, and one of the grounds of attack was that the effect, upon the lumber industry, of the carriers' action in advancing the rates, was the real ground upon which the Commission acted. But the court said that although the Commission considered that subject, its opinion taken as a whole affirmatively showed that it confined itself to the exercise of its statutory power to condemn unjust and unreasonable rates and fix reasonable ones. But the Commission was held, in Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, Adv. S. U. S. 1911, p. 22, 56 L. ed. —, 32 Sup. Ct. Rep. 22, to have exceeded its powers in making the allowance by a carrier, to the owner of an elevator, of the cost of the elevation in transit of grain in which he has an interest, conditional upon his failure to use the opportunity afforded during the process of elevation

to treat, weigh, inspect, or mix the grain. So much, however, of the Commission's order as confined such allowances to grain shipped within ten days was affirmed.

Another decision involving a carrier's allowance to shippers for elevating grain in transit is Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, Adv. S. U. S. 1911, p. 39, 56 L. ed. —, 32 Sup. Ct. Rep. 39, holding that a carrier cannot enforce a rule making its allowance for elevator service on through grain in carloads at terminal points conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, so as to defeat the right to compensation for elevator service rendered at elevators located on the lines of other railroads, where the return of the cars to the carrier was made impossible by the rules of a railway association of which the carrier was a member, and over which the elevator owners had no control, no such impossibility existing if the elevator was one of those located along the carrier's tracks. The carrier may, however, make such allowance at elevators located on the lines of other carriers, as well as those located along its own tracks, conditional upon the return of the empty car to the carrier within forty-eight hours after delivery to the elevator, where such car can be unloaded and returned in a much shorter time.

The carrier's right to depart from its established rates was one of the questions involved in Kansas City R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, Adv. S. U. S. 1911, p. 316, 56 L. ed. —, 32 Sup. Ct. Rep. 316, in which it was held that an agreement with a single shipper for shipments over connecting lines having no joint through rate, at less than the established local rates for each road, is void, and does not prevent the collecting of the established local rate by the carrier. This case, like United States v. Miller, 223 U. S. 599, Adv. S. U. S. 1911, p. 323, 56 L. ed. —, 32 Sup. Ct. Rep. 323, also holds that "posting" is not essential to make rates legally operative, but is required only as a means of affording special facilities to the public for ascertaining the rates actually in force.

The shipper's remedy was the question involved in Robinson v. Baltimore & O. R. Co. 222 U. S. 506, Adv. S. U. S. 1911, p. 114, 56 L. ed. —, 32 Sup. Ct. Rep. 114, in which it was held that a shipper cannot maintain an action in the courts to recover from a carrier the excess which he claims to have paid under a regularly established and published rate which is attacked as discriminatory, but that there first must be an investigation by the Interstate Commerce Commission and an appropriate finding and order. But in Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, Adv. S. U. S. 1911, p. 189, 56 L. ed. —, 32 Sup. Ct. Rep. 189, the court held that a shipper seeking relief because of the refusal of a carrier to accept interstate shipments of intoxicating liquors consigned to local-option or "dry" points, which the carrier seeks to justify under a state statute forbidding the transportation of such shipments, which is attacked as an unlawful regulation of commerce, may invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission, since the question involved is one of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

In several cases conflicting state and Federal regulation has been considered. Thus, in Northern P. R. Co. v. Washington, 222 U. S. 370, Adv. S. U. S. 1911, p. 160, 56 L. ed. —, 32 Sup. Ct. Rep. 160, it was held that Congress had so acted upon the subject of the hours of labor of interstate railway employees by enacting the hours of service act of March 4, 1907, as to preclude a state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employees a local regulation limiting hours of labor. So in Southern R. Co. v. Reid, 222 U. S. 424, Adv. S. U. S. 1911, p. 140, 56 L. ed. —, 32 Sup. Ct. Rep. 140, it was held that Congress has so completely taken control of the subject of rate making and charging, by the provisions of the act to regulate commerce and the amendments thereof, as to invalidate the provisions of N. C. Code, 1905, § 2631, so far as they

penalize the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state where no rate for such shipment has been established, filed, or published. And in Mondou v. New York, N. H. & H. R. Co. supra, it was held that the laws of the several states in so far as they covered the same field, including the method of distribution of the sums recovered, were superseded by the enactment by Congress of the employers' liability act.

Other important rulings affecting commerce are found in Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, Adv. S. U. S. 1911, p. 205, 56 L. ed. —, 32 Sup. Ct. Rep. 205, reaffirming the validity of the Carmack amendment, imposing upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, liability to the holder of the bill of lading for a loss anywhere *en route*, with a right of recovery over against the carrier actually causing the loss, despite any agreement or stipulation limiting liability to its own line; United States v. Baltimore & O. S. W. R. Co. 222 U. S. 8, Adv. S. U. S. 1911, p. 6, 56 L. ed. —, 32 Sup. Ct. Rep. 6, holding that a carrier does not transport, or deliver or receive live stock for transportation, from a quarantined portion of a state, in violation of the prohibition of the act of Congress of March 3, 1905, § 2, where, being a connecting carrier, it receives the live stock from the preceding carrier at a point in a state other than the quarantined state for delivery to a point in the same state; Louisville & N. R. Co. v. F. W. Cook Brewing Co. supra, holding that a carrier incorporated under the laws of Kentucky cannot justify its refusal to accept interstate shipments of intoxicating liquors consigned to localities in that state, where local-option prohibitory laws prevail, under a state statute making the transportation of such shipments unlawful, since such statute as applied to interstate shipments is an unlawful regulation of commerce; Red "C." Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, Adv. S. U. S. 1911, p. 152, 56 L. ed. —, 32 Sup. Ct. Rep. 152, upholding the North Carolina oil inspection act, which subjected all kerosene or other illuminating oils sold or offered for sale in the state to an inspection for the purpose of determining the safety and value of such oils for illuminating purposes, and imposed a charge of ½ cent per gallon for the avowed purpose of defraying the expense connected with the inspection; The Abby Dodge, 224 U. S. —, Adv. S. U. S. 1911, p. 310, 56 L. ed. —, 32 Sup. Ct. Rep. 310, holding that Congress could validly prohibit the landing at any port or place in the United States of sponges taken between certain dates outside of state territorial waters, but could not control the taking or gathering of sponges from land under water within state territorial limits.

Recent State Decisions

Auction — second sale — dispersal of bidders. A resale of mortgaged property at auction under a power contained in the mortgage, upon the refusal of the first bidder to comply with his bid, is held in Love v. Harris, 156 N. C. 88, 72 S. E. 150, to be invalid, if made after the bidders have dispersed, without a new notice of sale.

As appears by the cases collected in the note accompanying the above decision in 36 L.R.A.(N.S.) 927, it may be stated as a general rule that if the first sale fails, a resale may be had if the bidders have not dispersed, and especially if provision for such a resale was made a condition of the first sale; but if the bidders have departed, and the first sale has been closed, a second sale cannot be had without a new notice.

Carrier — baggage — transfer company — liability. One engaged in transferring baggage for hire is held in Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 36 L.R.A.(N.S.) 640, not to be within the protection of a public-service law making every common carrier and

railroad company liable for loss, damage, and injury to property carried as baggage, to the full value thereof, but requiring value over a certain amount to be stated and extra compensation paid for the extra risk, since the word "baggage" refers to property transported as an incident to the transportation of the owner as a passenger.

This decision overrules the only earlier case on the subject.

Carrier — contract against negligence — inspection of cars by shipper. A carrier is held in Adams v. Colorado & S. R. Co. 49 Colo. 475, 113 Pac. 1010, not entitled to relieve itself from liability to furnish suitable cars, by providing in a carriage contract that the shipper must inspect cars, and that use of those tendered will be an acknowledgment of their suitability, and that he assumes the risk of loss from defects in cars accepted.

As appears by the cases gathered in the note which accompanies this decision in 36 L.R.A.(N.S.) 412, the great weight of authority supports the rule that a common carrier cannot by contract impose upon the shipper the obligation and duty of inspecting and determining that the car provided is safe, suitable, and sufficient, since the carrier's failure to furnish a safe and suitable car is in itself negligence, and such a contract would allow the carrier to contract for exemption from responsibility for its own negligence.

Carrier — passenger in vestibule — duty to leave car. The first case to pass upon the duty of a passenger to leave a crowded street car at the request of the conductor is Liversidge v. Berkshire Street R. Co. 210 Mass. 234, 96 N. E. 665, 36 L.R.A.(N.S.) 993, holding that one who has paid his fare and been received as a passenger on a crowded street car has not, as matter of law, a right to ride in the vestibule against the order of the conductor, until he can, with reasonable diligence, gain admission inside the car, but he must comply with the request either to go inside or to get off the car.

Covenant — building restrictions — failure to insert in deed. That restrictive building covenants were not inserted in deeds to lots in a plat is held in the Michigan case of Allen v. Detroit, 133 N. W. 317, not to prevent the enforcement of them against the owners, if they were part of a general plan for the tract, and the lots were all sold with the understanding that the conveyances were subject to such restrictions.

This seems to be a case of first impression on the question as to the binding effect of a building restriction upon property in the hands of a municipality.

Evidence — homicide — motive — character of deceased. Upon trial of a father for killing a man who was paying unwelcome attentions to his daughter, it is held in the Tennessee case of Smithson v. State, 137 S. W. 487, that the defendant may testify to conversations with deceased indicating that the latter was lecherous to a high degree, and in which he boasted of his conquests of women.

While cases are numerous in which the admissibility of evidence of deceased's immoral conduct with the defendant's wife or relatives is passed upon, few cases have considered the right to show the deceased's immoral disposition or character as bearing upon the defendant's intent or motive.

This decision, as appears by the note accompanying it in 36 L.R.A.(N.S.) 397, is in conformity with the determination of the courts in other cases.

Highway — additional burden — street railway. That a street railway is an additional burden on the fee of a street, for which compensation must be made the abutting owner, is held in Rasch v. Nassau Electric R. Co. 198 N. Y. 385, 91 N. E. 785, the report of which, in 36 L.R.A.(N.S.) 645, is followed by an exhaustive note in which the numerous cases treating of the right of an abutting owner to compensation for railroads in streets are collected and discussed.

Highway — elevated railroad crossing — duty to light subway. The police power of a municipal corporation is held in Chicago v. Pennsylvania Co. 252 Ill. 185, 96 N. E. 833, 36 L.R.A.(N.S.) 1081, not to extend to requiring a rail-

road company which has elevated its tracks over a street crossing, to light the subway, although it is darkened by the tracks, since persons passing through the subway encounter no danger from the operation of the railroad.

This seems to be the first decision upon this point.

Injunction — mandatory — removal of building. That one who locates his building partly on the land of an adjoining property owner, without any survey or search for boundaries, although he has been warned not to encroach on the neighboring property, may be compelled by mandatory injunction to remove the encroachment, is held in Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56.

Mandatory injunction to compel the removal of encroachments has frequently been allowed by the courts. A reason for this is the impracticability of putting the owner in possession of the action of ejectment. This difficulty has been recognized by the courts, which, doubtless, therefore, have allowed the remedy by injunction more often than they otherwise would have done. On the other hand, it will be seen by reference to the annotation appended to the foregoing decision in 36 L.R.A.(N.S.) 402, that some courts, especially where there are inequitable incidents, have denied the remedy and relegated the adjoining owner to an action at law.

Insurance — estoppel — failure to act on application. That an insurance company does not, by delay in passing upon an application presented by an uninsurable risk, assume the obligation of an insurer upon the theory that its conduct prevents the securing of insurance elsewhere and creates a legal presumption of acceptance, is held in Northwestern Mut. L. Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, annotated in 36 L.R.A.(N.S.) 1211.

Insurance — loss by riot — burning of building by marshal. The question of the liability of an insurance company for the destruction of a building burned to secure a fugitive from justice was considered, apparently for the first time in American Central Ins. Co. v. Stearns Lumber Co. 145 Ky. 255, 140 S. W. 148, 36 L.R.A.(N.S.) 566, holding that the unauthorized burning of a building by a deputy United States marshal, to effect the arrest of persons who had taken refuge therein and were holding the authorities at bay with firearms, does not come within a provision of a policy of insurance upon the building, exempting the insurer from liability for loss caused directly or indirectly by riot or by order of any civil authority, for although the fugitives were guilty of a riot, their acts were not the cause of the loss, which was due to the unlawful acts of the marshal.

Intoxicating liquors — interstate commerce — soliciting orders by mail. A criminal accusation charging that the defendant, who lived in Chattanooga, Tennessee, solicited orders for the sale of intoxicating liquors, by a circular sent through the United States mails from Chattanooga to a person living in Georgia, where selling or soliciting orders for intoxicating liquors is prohibited under Georgia Penal Code 1895, § 428, is held in R. M. Rose Co. v. State, 133 Ga. 353, 65 S. E. 770, annotated in 36 L.R.A.(N.S.) 443, not to set forth any crime and to be subject to general demurrer.

This case seems to be one of first impression as to the power of a state to prohibit the solicitation of orders for intoxicating liquors by sending circulars through the mail from points outside the state to persons within the state.

Judgment — collateral attack — settlement secured by fraud. The next friend of an infant is held in the Maryland case of Clark v. Southern Can Co. 81 Atl. 271, not entitled to institute on its behalf a suit to recover damages for personal injuries to it, while the record of a prior suit in the same court, between the same parties, for the same cause of action, bears the entry "agreed and settled," made under the eye and sanction of the court by order of the plaintiff, who had signed a release of the claim, although it is claimed that the release and consequent entry were procured by fraud.

The character and kinds of judgments and orders within the rule that judgments and orders cannot be collaterally attacked for fraud not affecting the jurisdiction are set forth in an exhaustive note accompanying this decision in 36 L.R.A.(N.S.) 980.

Landlord and tenant — lease of hotel with waterworks — duty to keep in repair. One letting, for hotel purposes, certain premises, "including the waterworks and connections used exclusively to supply it with water," is held in Smithfield Improv. Co. v. Bardin, 156 N. C. 255, 72 S. E. 312, not bound to keep the waterworks in working order.

The duty of a landlord to keep the plumbing in proper repair for a tenant's use is discussed in the note which accompanies this decision in 36 L.R.A.(N.S.) 907.

Landlord and tenant — lease of farm — shortage in acreage — deduction of rent. One who leases for agricultural purposes a tract of land estimated to contain about a certain number of acres, for a gross rental calculated upon the estimated acreage, is held in Stock v. Christle 151 Iowa, 238, 130 N. W. 1074, not entitled to claim a deduction of rent because he cannot utilize every acre, on account of a railroad right of way across the property, if the shortage is a comparatively small amount.

The cases dealing with the right to a reduction in the rent of a farm because part of it is not tillable are gathered in the note accompanying the foregoing decision in 36 L.R.A.(N.S.) 555.

Monopoly — contract for exclusive right of way — validity. A question which has been but seldom before the courts was considered in Calor Oil and Gas Co. v. Franzell, 128 Ky. 715, 109 S. W. 328, annotated in 36 L.R.A.(N.S.) 456, holding that a contract by the producer of oil and gas for exclusive right of way across a farm lying between oil land and the market is void as against public policy.

Sale — breach of warranty — use of property — ratification. That a purchaser of a carload of hoops and liners for barrels waives his right to rescind for inferiority of quality by using nearly half of the shipment, although he promptly notifies the seller of the inferiority, and claims a discount from the contract price because thereof, is held in the Washington case of Noble v. Olympia Brewing Co. 117 Pac. 241, which is accompanied in 36 L.R.A. (N.S.) 467, by a note discussing the cases dealing with the question whether use of property purchased is a waiver of the right to rescind for breach of warranty or noncompliance with contract.

Tax — protest — necessity of stating grounds. The grounds of protest which accompanies a payment of taxes need not, according to the decision rendered in the Rhode Island case of Whitford v. Clarke, 80 Atl. 257, be set out, in order to authorize a recovery of the amount paid, if the tax was invalid.

The question of the necessity and sufficiency of the statement of grounds in a notice of protest, required as a condition of recovering back payment of an unlawful tax, is treated in an extensive note appended to the foregoing decision in 36 L.R.A.(N.S.) 476.

Voter — right to swear in vote. That election officers cannot refuse to administer the oath or receive the ballot after the oath is taken, under a statute providing that if a challenged voter insists that he is qualified, the judges shall tender to him a prescribed oath, if he takes which his vote shall be received is held in the Iowa case of Lane v. Mitchell, 133 N. W. 381, annotated in 36 L.R.A. (N.S.) 968.

This decision is in accord with the general rule that statutes making the oath of the voter the test of his qualification, either generally or in certain particulars, are imperative. While, of course, the matter must rest upon the language of the statute, it may be said that there is a general disposition to treat the duties of election officers as ministerial, unless they are plainly invested with discretion.

Recent English and Canadian Decisions

Bankruptcy — liability of bankrupt for annuity payable to wife under separation deed. The claim of a wife for an annuity which a husband has covenanted to pay under a deed of separation, the covenants of which were to become void on the married parties presuming cohabitation, being provable against the husband in bankruptcy, the wife cannot thereafter maintain an action against the husband on his covenant to pay, notwithstanding she had not elected to prove her claim in the bankruptcy proceeding. Victor v. Victor [1912] 1 K. B. 247.

Contract fixing rates — validity — public policy. An agreement between companies operating steamships on a certain river, that they will abide by an agreed tariff for the season, is held in St. John River S. S. Co. v. Star Line S. S. Co. 40 N. B. 405, not to be void as against public policy and in restraint of trade, the arrangement being only for the season, the rates proper and reasonable, and the agreement by safeguarding the shippers from the inconvenience arising from fluctuating rates being rather in favor of the interests of the public than injurious to them.

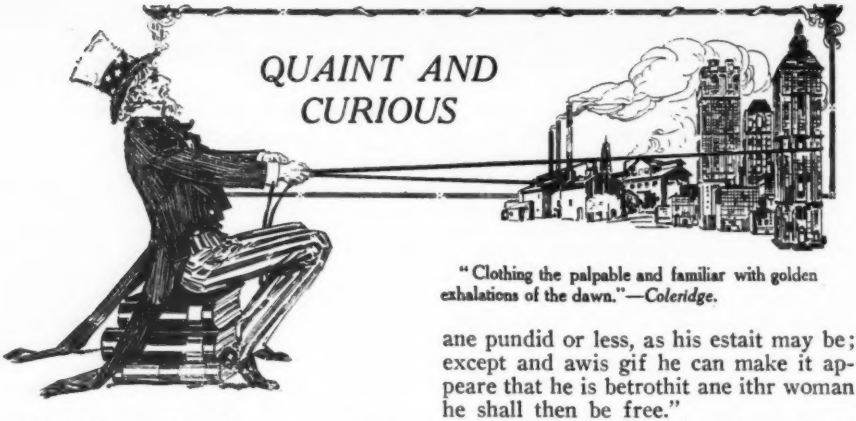
Damages — subsequent advantageous sale of property as affecting damages recoverable for breach of contract to purchase. It is a settled rule that the measure of damages recoverable for refusal to perform an agreement to purchase goods is the excess of the contract price over the market price at the time when the goods were to have been delivered; and no exception to this rule arises from the circumstance that the seller may have recouped himself, either wholly or in part, by subsequently making a more advantageous sale of the property. Sharpe v. White, 25 Ont. L. Rep. 298.

Evidence — offering document after refusal to produce. That a party who upon notice refuses to produce a document at a trial, thereby compelling the other party to prove it by secondary evidence, can thereafter neither introduce it in his own behalf nor give oral evidence of its contents, is held in Cyr v. DeRosier, 40 N. B. 373.

Libel — statement that one has given a chattel mortgage. A statement that a man has given a chattel mortgage is, even though false, not libelous *per se*, and no action is maintainable for its publication, in the absence of an innuendo showing that the words were defamatory by reason of their being understood in a special sense, or had to certain persons a defamatory meaning, setting out this defamatory sense or meaning, and averment and proof of special damage thereby occasioned. Smith v. Dun, 21 Manitoba L. Rep. 583.

Will — demonstrative legacy — reversionary fund — time from which interest runs. A demonstrative legacy, although payable out of a reversionary estate, carries interest, in the absence of anything in the will to show that payment is to be made only when the reversion falls in, from the expiration of a year from the testator's death, rather than from the time when the reversion falls into possession. Re Walford [1912] 1 Ch. 219.

Writ and process — foreign corporation — carrying on business within jurisdiction. A corporation organized in Canada for the purpose of constructing and operating a railroad, four of whose directors resident in England formed a committee, having a secretary and staff, which met at an office in London, England, for which they paid no rent, which committee, under power conferred by the company's by-laws, dealt with the issue of loan capital to be used for the construction of the railroad, paying the money raised into an account at a London bank, out of which account remittances were made to Canada, and transacted no other business,—is carrying on business within the jurisdiction and therefore amenable to the process of the English courts. Actiesselskabet Dampskib "Hercules" v. Grand Trunk P. R. Co. [1912] 1 K. B. 222.



"Clothing the palpable and familiar with golden exhalations of the dawn."—*Coleridge.*

Quaint Leap Year Customs. History gives the "ladies' leap year privilege" as a well-accepted fact. It is an old one, observes the Brooklyn Eagle, becoming a part of the common law of social life in Great Britain as early as 1606. "Courtship, Love, and Matrimony," published in that year, says:

Albeit it is nowe become a part of the common lawe, in regard to the social relations of life, that as often as every bissextile year doth return, the ladyes have the sole privilege, during the time it continueth, of making love unto the men, which they doe either by words or lookes, as to them it seemeth proper; and moreover no man will be entitled to the benefit of clergy who doth in any wise treate her proposal withe slight or contumely."

One legend by which it is attempted to account for the origin of the privilege relates that an appeal was made to St. Patrick to accord to women the same right of proposing at any time as the men have. This he refused, but was willing to concede the right every seventh year. Finally, as a compromise, he agreed that women should enjoy the right every four years, and that this year should be the longest of the four.

In 1288 it is said that a law was enacted in Scotland that:

"It is stut and ordaint that during the rein of hir maist blissit megeste, for like yeare known as lepe year, ilk maiden ladye of both highe and lowe estiate shall hae liberte to bespeke ye man she likes; albeit he refuses to taik hir to be his lawful wyfe, he shall be mulcted in ye sum ane pundid or less, as his estait may be; except and awis gif he can make it appeare that he is betrothit ane ithr woman he shall then be free."

A like law is said to have been passed in France about the same time. In the fifteenth century the custom was legalized in Genoa and Florence. In Scotland, in later years, and perhaps at present, the women have the privilege at many private dances of choosing their own partners in a leap year. Men stand about the walls of the room, like veritable wall flowers, waiting "to be asked." They look pictures of sheepish anxiety until they are courtesied to and led forth to the dance by the fair one. Frequent "asking" is supposed to accentuate the "hint" that a proposal trembles on the lips of the fair one.

Auto Suggestion. A queer plea of auto suggestion caused the acquittal of six Croatian peasants accused of killing a peddler at Ribnik village. The peddler was suspected of having fired a number of ricks in the neighborhood.

Evidence given at the trial showed the peddler was seized by the six prisoners and taken before the assembled villagers, men and women, who, without questioning his guilt, beat him to death with flails, cut up his body with scythes, and burned the remains in a straw bonfire.

The defending counsel argued that the peasants had, "so to speak, mesmerized each other in their common excitement about the burned ricks, and, being in a state of auto suggestion, were not responsible for their actions." The court accepted the plea and liberated the prisoners.

A Fable of the Farm. Once there was a farmer who sold a cow and was unable to collect the price. He finally hired a lawyer from the county seat and sued his debtor before a justice of the peace. The lawyer tackled the case with vim and vigor, and won for his client.

Then, of course, he presented his bill.

"Will you take the cow and call it square?" asked the farmer.

Although the value of the animal was slightly below the lawyer's bill, the barrister, just to show that he was a good fellow, waived the difference and accepted the cow.

Then the farmer, showing his gameness, invited the lawyer home to dinner, and before the town chap left the premises there was a horse trade, in which the lawyer had to give the cow to boot. And more than that, as soon as he reached home he gave away the horse, so that it could not be used as evidence of how he had been stung.

Moral—What a farmer doesn't know about law is balanced by what the average lawyer doesn't know about horse trading.

Doubly Guilty. At a recent dinner in Washington, Secretary of State Knox was speaking about the forms that are observed in the administration of law in England, and found much to commend in the added dignity that was given thereby to the administration of justice. But that legal phraseology may sometimes be carried to excess he instanced by quoting the remarks of a Scotch judge who had to sentence a man to death for the crime of murder. Said his Honor:

"You did not only kill and murder the man, and thereby take away his valuable life, but you did push, thrust, or impel the lethal weapon through the band of his regimental trousers, which did not belong to the man you murdered, but were the property of his Majesty the King."

Made the Tailor Pay. Law in Germany takes some odd turns, according to a Chicago lawyer recently back from abroad.

One case the traveler related with amusement concerns a tailor, a student, and the University of Berlin. A student had ordered an evening suit from a tailor. He already owed him money for former orders, but promised faithfully to pay what was coming to the tailor, as his father had promised to send him a sum of money. The student was to pass an examination for a government position, and the suit was to be ready the same morning, and he was to call for it and pay the bill. He called as agreed, and told the tailor he did not have time to cash the draft his father had sent him, but would call after the examination.

The tailor insisted on having his money, and, not being paid, he refused to let the student use the suit he had ordered for the examination. The result was that the latter missed the examination. It was ascertained later that the student's father had sent him money, and that he had spent the cash for a dinner given to some friends.

Suit was brought by the father against the tailor as being the cause of his son's failing to pass the examination, and the university as a corporation also sued the tailor for disrespect to it and the government in preventing a German subject from entering the government service through examination.

The judge held the tailor guilty in both cases and fined him 500 marks, at the same time expressing his pleasure in being legally permitted to punish the defendant for "his lack of patriotism and love of the fatherland."

Street Improvement as a Fine Art. In the case of Taylor v. Palmer, 31 Cal. 240, an action to recover an assessment for a street improvement by the assignee of the contract, the defendant made the point that the contract was not assignable, as the work was in the class which the workman was engaged to do because the employer had confidence in and trusted to his ability to do it well. Judge Sanderson, in disposing of this point, was rather florid in his rhetoric. There is nothing in the statute, or the contract, or the nature of the work, said he, suggestive of such a theory. The public generally is invited to bid for and take these contracts regardless of professions, trades, or occupations. The

contractor is not expected, nor required, to perform the work in person. Whether he knows anything about road making, or can tell the difference between a mud turnpike and a Nicholson pavement, or whether a sewer should be constructed in the shape of a congitudinal section of an eggshell, or which end of the section should be uppermost, is of no consequence, for the contract is not awarded to him because of his supposed knowledge or skill, but because his bid is the lowest, and his bond for the performance of the work in a workmanlike manner, and according to the specifications, is good. All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine; nor do all writers write dramas like Shakespeare, or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal and cannot be assigned. But rare genius and extraordinary skill are not indispensable to the workmanlike digging down of a sandhill, or the filling up of a depression to a given level, or the construction of brick sewers with manholes and covers; and contracts for such work are not personal and may be assigned.

The style of this is admirable, whatever reserve one may feel about yielding to the reasoning in view of Judge Sanderson's concession that the Board of Supervisors were vested with a discretion to reject all bids whenever the public good was deemed to require such action, and to reject the bid of any contractor who had proved unfaithful or delinquent in a previous contract. In this association one may recall an anecdote of two ditch diggers who met at a wake over the corpse of one of their fellows. "He was a good man," said one. "He was that," assented the other. "He was a good shoveler," said the first. "He was a good shoveler," acquiesced the second, who claimed to be something of an artist in that line himself. "He was a *very* good shoveler," continued the first. "He was a *good* shoveler," said the second in return, "but he was not what you would call a fancy shoveler."

Knew the Law. If women ever come to sit on the bench in old Virginia, there's a maiden lady living on her ancestral acres just across the Potomac from Washington, says the Boston Herald, who can qualify for the job.

Recently an estate company bought a tract of land the other side of her property and cut it up into suburban lots. Desiring ready access to the capital, they instituted proceedings to run a public road through the old lady's land; worse, as she learned, the projected road would cut right through the prettiest part of her trim lawn, dear with its memories of her childhood.

She consulted her lawyer, only to be told there was no help for it, since private property may, under the law, be acquired for public use, no matter how unwilling an indignant owner may be.

Far from resigning herself to the ruthless inroad on her cherished lawn, the old lady buried herself in the musty law library handed down from an ancient ancestor, once a prominent judge in the old dominion.

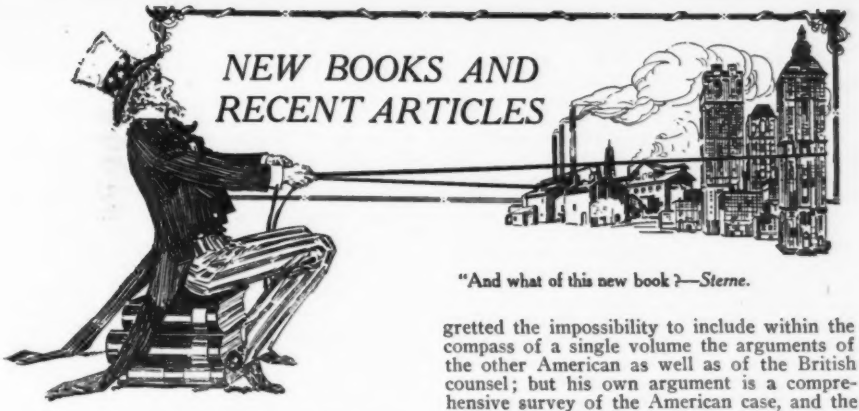
When, some days later, a party of surveyors appeared with stakes and chains to lay out the line of road, they found the owner, spade in hand, just setting out the last of a phalanx of young apple trees squarely in front of the lawn, and right in the line of the proposed highway.

"If you set foot inside this orchard," she said, defiantly, to the astonished surveyors, "I'll have you all thrown out and then arrested for trespass." With that she called up half a dozen lusty young countrymen waiting behind the barn for the summons.

"What does all this mean?" asked the leader of the surveying party, in whose contract there had been no mention of fighting. "We are surveying for a public road, and can go anywhere."

"Anywhere—except through an orchard!" exclaimed the old lady, pulling a musty volume from under her apron. "It's been the law in Virginia since the days of Patrick Henry that you can't run even a public road through an orchard; so you stay out!"

The old lady had dug up an ancient law unknown to modern attorneys, confounded her opponents, and saved her lawn.



"And what of this new book?—*Sterne.*

Fisheries Arbitration Argument. By Hon. Elihu Root. Edited with Introduction and Appendix by James Brown Scott. (The World Peace Foundation, 29 Beacon St., Boston, Mass.) 674 pp. By mail, $3.50.

In his now famous address at Washington, on December 17, 1910, before the Society for the Judicial Settlement of International Disputes, in which he made his great plea for the arbitration of all international differences which could not be settled by regular diplomatic negotiation, President Taft said: "What teaches nations and peoples the possibility of permanent peace is the actual settlement of controversies by courts of arbitration. The settlement of the Alabama controversy by the Geneva Tribunal, the settlement of the Seals controversy by the Paris Tribunal, and the settlement of the Newfoundland fisheries controversy by the Hague Tribunal are three great substantial steps toward permanent peace, three facts accomplished that have done more for the cause than anything else in history." It is singularly fortunate that at this particular time, when the minds of the American and English peoples are focused upon the subject of international arbitration as never before, we should be given the present volume, in which the last of the three great arbitrations so conspicuously referred to by President Taft is presented, in its history and in the argument of Mr. Root, the leading American counsel in the case, with a completeness unexampled, as concerns provision for the general public, in the annals of great arbitration cases. Of the 674 pages of this imposing volume, 374 pages are devoted to the exhaustive and powerful argument of Senator Root; and the other 300 pages are equally divided between the learned and illuminating historical introduction by Dr. James Brown Scott, of counsel for the United States, and the appendix, in which Dr. Scott has brought together a complete collection of the great mass of treaties and correspondence which preceded the arbitration, covering a period of more than a century, together with the full text of the award of the Tribunal. In consenting to the publication of his own argument in this convenient and permanent form, Mr. Root regretted the impossibility to include within the compass of a single volume the arguments of the other American as well as of the British counsel; but his own argument is a comprehensive survey of the American case, and the introduction and the appendix put us in possession of the entire situation. Mr. Root's American associates were Hon. George Turner, Hon. Samuel J. Elder, Hon. Charles B. Warren, Hon. James Brown Scott, and Hon. Robert Lansing, the agent for the United States being Hon. Chandler P. Anderson. The American member of the tribunal of five was Hon. George Gray; and the complete list of members of the tribunal, together with the British agent and counsel, are given in the volume. The record shows impressively, as the editor emphasizes, how easily nations may settle long-standing and vital disputes by judicial means, if they are only minded to do so, and also that the good feeling marking such proceedings at The Hague not merely avoids the bitterness engendered by war, but draws the nations themselves and their representatives closer together. The award is gratifying to friends of arbitration everywhere, he says, "because an historic controversy, coincident with the independence of the United States, and which at times seemed not unlikely to result in war, was decided by a tribunal at a single session of little more than three months, and the question removed from the field of controversy.

It was indeed a remarkable coincidence, as emphasized by Dr. Scott in the preface, by which Mr. Root, who as Secretary of State finally raised and framed the issue, appeared as counsel and argued the case before the International Tribunal. But it is the intrinsic value of the argument which gives it its great interest; and the submission of it in this worthy and adequate setting will be welcomed with profound satisfaction, not only by the students of international law, but by all workers for international progress.

"Medical Jurisprudence and Toxicology." By John J. Reese, M.D. Revised by D. J. McCarthy, A.B., M.D. (P. Blakiston's Son & Co., Philadelphia, Pa.) $3 net. This well-known treatise has now attained its eighth edition. The text contained in former editions has been so far modified, altered, or added to as to keep abreast of advanced thought and investigation; but this result has been reached without enlarging the work to

such proportions as to deprive it of its former character as a text-book for the student and a reference manual for the attorney and general expert.

Dr. Reese, who for over twenty years was professor of medical jurisprudence in the University of Pennsylvania, indulged in the hope, in preparing his treatise, that he might awaken in students an increased interest in the important but neglected subject of Forensic Medicine. He presented in simple, graceful style and in a concise manner the essentials of the science, elaborating more fully the subjects deemed to be of the greatest practical importance. Drawing his materials from the classic labors of earlier writers, he stamped them with his individuality, and produced a work which allures the student, and is of aid to the practitioner. The revision has added materially to its value.

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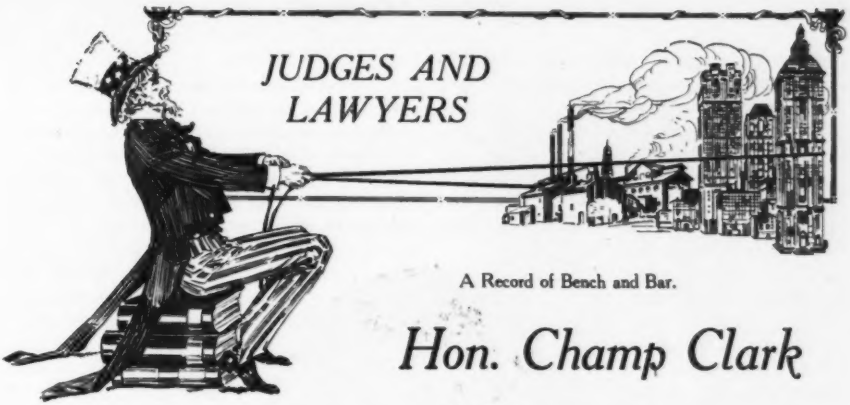
"We have tunneled the heart of darkness, we have traveled the upper air,
For who shall write in the book of man, this thing thou shalt not dare?
So we of the race of dominance, lords of land, and of brain,
Have wielded the staff of Moses, and cloven the land in twain.

"The races of men will mingle when the seas of the earth are wed,
The ships of a hundred nations the paths of the sun will thread,
And the golden galleys of commerce, borne by the winds of fate,
Will cast their magnificent anchors hard by the Golden Gate."



A Record of Bench and Bar.

Hon. Champ Clark

"FORTY years ago a young Kentuckian," writes Mr. Frank Parker Stockbridge, in The World's Work, "who wanted to be a school teacher, was advised to apply in writing for the position of principal of a normal school. He did so. His application did not convey any very clear idea of his qualifications as a teacher, but in other respects was a model of conciseness.

" 'I am twenty-two years old,' he wrote. 'My postoffice is Lawrenceburg, Kentucky. I am 6 feet 1 inch tall, weigh 175 pounds, am a college graduate, a Democrat in politics, a Campbellite by religion, and a Master Mason. Yours truly, J. B. Clark.'

"The author of that document is now an applicant for a larger job,—that of President of the United States. He has not filed a written application, but the information available to the inquirer who undertakes the serious task of trying to ascertain his qualifications is much like that contained in young Mr. Clark's note of 1872,—and just about as satisfying. He is sixty-two years old, instead of twenty-two. He weighs 50 pounds more, and hails from Missouri instead of Kentucky. He has taught several schools and has been a member of Congress for eighteen years. His hair is white instead of yellow, but his voice is as strong as ever. Incidentally, he has dropped his first name and half of his second. He is now plain Champ Clark.

"It would be unfair to Mr. Clark to intimate that those are his only claims to the Democratic Presidential nomination. . . .

"First among the causes that have brought Champ Clark to the point of being a serious factor in the presidential contest is his personality. Regard him as of presidential size or not, it requires only brief personal contact with the big speaker, to be charmed and impressed with his quality of friendliness. Everyone likes him, and he likes everyone. His bitterest political enemies have been his warmest personal friends. It was this likeableness that won him his leadership in Congress, and enabled him to conciliate the warring factions of his party and weld them into a working unit. And this harmonizing of the Democrats in Congress is easily the biggest thing Champ Clark has ever done. . . . His life story differs only in detail from the stories of thousands of poor boys who have won their way into Congress. It is the typically American story of native ability, industry, and adventurous spirit,—farm hand, school teacher, store keeper, country editor, lawyer, orator—the progression is a familiar one to every reader of American biographies. His mother died when he was three years old. As a barefoot boy of twelve he got near enough to the battle of Perryville to hear the shooting, and once he saw a little band of seven home guards stand off the whole of Morgan's cavalry brigade. That was all he saw or heard of the Civil War. . . . His oratory and his personal popularity won him an election to the lower house of the Missouri state legislature, where he served one term in 1889. As chairman of the jurisprudence committee he reported a bill—he does

not claim the authorship of it—prohibiting combinations in restraint of trade and forbidding monopolies to do business in Missouri. It was one of the first anti-trust laws enacted in America. It still stands unamended, and it was through its enforcement, curiously enough, that Herbert S. Hadley, as attorney general of Missouri, won the fame which enabled him to defeat Champ Clark's law partner, Senator Ball, for governor. Another legislative achievement of which Mr. Clark is proud was the introduction of a bill providing for the Australian ballot. . . .

"In 1892 the opponents of the sitting member got together, and put up Champ Clark to contest for the nomination against Congressman R. H. Norton. Even with the contest narrowed down to two men, the campaign was a protracted and bitter one. From March until the end of August the candidates stumped the district, accompanied by armed guards. The convention sat for nine days, and finally split and nominated both Clark and Norton. The state committee settled the matter by ordering a direct nomination at a primary election. Democratic voters chose Champ Clark, and in November he became a member of Congress. . . . He is always in great demand by Chautauqua audiences. 'Richer than Golconda' is the title of one of his popular lectures. It deals with the literature of the Bible. Other subjects include current political topics and the lives of bygone statesmen. . . . He still works his way via the Chautauqua route from Washington to Bowling Green and back. Incidentally, he has thus been seen by more voters than any other man in public life, except possibly Mr. Bryan, Colonel Roosevelt, and President Taft.

. . .

"'I have devoted more time to the tariff,' states Speaker Clark, 'than to any other political question. I debated it as a boy in school. When I first came here in 1893 I thought I knew all about it. Now I feel like Sir Isaac Newton in the presence of the mysteries of the universe,—like a boy picking up shells on the seashore. The question ramifies into so many other things that it embodies all human activities, and if one is studious he can learn something new about it all the time. As the government is conducted at present, we have to raise a billion dollars a year. Whether that rate of expenditure will ever be reduced I do not try to say. I have been wrestling with that question. We have only two great sources of revenue,—the tariff and the internal revenue tax. There used to be a great revenue from the land office, but it is about gone now. We have to raise from $325,000,000 to $350,000,000 a year from the tariff. Perhaps if the income tax amendment, which I favor, is adopted, we can reduce the tariff considerably. My idea of tariff reform is to levy the highest taxes on luxuries that they will bear, and not invite smuggling in large quantities, and the lowest tariff or none at all on necessaries. The whole thing needs overhauling from top to bottom, and readjusting, to cut out the monstrosities and extortions in the Payne bill, and raise the maximum revenue, while at the same time taking the minimum of money from the pockets of the people. . . . I introduced the Australian ballot bill in the legislature, against the opposition of the politicians. I was really the author of the parole bill. I was the cause more than any other man living or dead of the

HON. CHAMP CLARK

primary law being adopted in Missouri. The first congressional primary ever held in the state was the one at which I was nominated; and afterwards primaries were adopted by law.' . . .

"A human, likeable gentleman, this member from Missouri,—pleasant to talk with or to listen to, popular, magnetic, devoted to his books and his home and his family. His comfortable old white house at Bowling Green is as crowded with books as a public library. An interesting personality, that of Champ Clark."

Death of Judge Jordan

Judge James H. Jordan, who died on April 5th, was serving his third consecutive term as judge of the Indiana supreme court. He was active in politics before his elevation to the bench, and served the Republican party on both district and state committees. Judge Jordan was born at Woodstock, Shenandoah county, Virginia, December 21, 1842. He came to Indiana as a boy and served during the Civil War with an Indiana regiment. He participated in seventy-nine battles and skirmishes and was twice wounded. When the War closed he attended Wabash College for two terms and later entered the State University. He studied law and practised at Martinsville, where he was city attorney for twelve years and later prosecuting attorney. He was elected to the supreme court in 1894 and twice re-elected.

Decease of Kansas City Lawyer

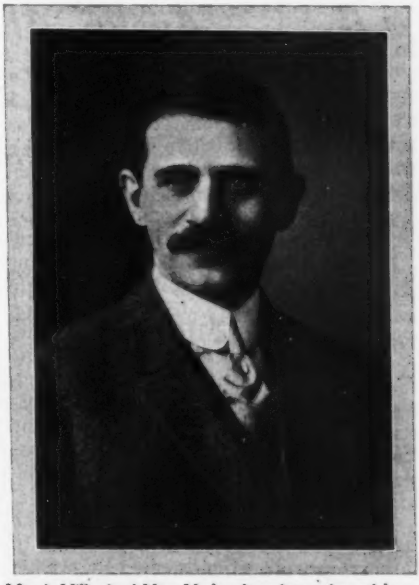
Llewellyn E. James, for many years confidential attorney for Armour & Company, director of the Metropolitan Street Railway, the Interstate National Bank, and other similar institutions, and one of the largest real-estate holders in either Kansas City, died on May 1st, as the result of a fracture of the skull sustained in a fall from a street car.

Prominent New York Lawyer Dies.

David McClure, long a member of the New York bar, died on April 30th.

In his forty-three years as an attorney Mr. McClure was engaged in many notable cases. As counsel for the executors he engaged in the settlement of the estate of Cardinal McCloskey with success. Other cases of this kind were the Merrill will case, the Schuyler Skaats will case, and the settlement of the estate of A. T. Stewart.

When ex-Justice Morgan J. O'Brien declined to act as a member of the commission which was to determine the sanity of Harry K. Thaw in 1907, Mr. McClure was named to take his place.



Morris Hillquit of New York whose interesting article on "Government Ownership of the Trusts" appears in this issue, (see page 30).

Former Chief Justice Morgan.

David E. Morgan, aged 62, former chief justice of the supreme court of North Dakota, died on May 11th at Banning, Cal. Ill health caused him to resign from the bench only a few months ago after he had served continuously as judge since statehood, part of the time being on the district court bench in the Second district, and the rest of the time on the supreme bench.

He gave twenty-two years of his life to judicial service. His opinions were marked by clearness of thought and a command of pure English not excelled by the opinions found in the reports of any court.

Austin Abbott, LL.D.
A Jurist Who Lives in His Works

BY THE EDITOR

FOR many years Dr. Austin Abbott occupied a commanding position in the field of legal literature. He was at all times a prolific author, and if his varied writings, which included treatises, digests, reports, and periodicals, were gathered together, they would constitute a goodly library. Yet he was far from being a literary recluse. His achievements in authorship were supplemented by a wide practice at the bar, by his work as a legal educator, and by an active interest in the religious and reformatory movements of his time. He gave much thought to the welfare and possible future of the Indian tribes, and had an almost prophetic faith in the future of international arbitration.

Literary Labors

We may indeed wonder that one so slight of physique should be able to endure such incessant labors. But marked intellectual powers, together with facility in composition and a rare faculty of clear and accurate statement, were his by right of inheritance. In addition he was endowed with a generous zeal, which bordered on enthusiasm, and enabled the mental to dominate completely the physical. "Whatever he did," writes Mr. Carlos C. Alden, "received, in its doing, his best efforts; no line in book or article emanated from his pen, no sentence in lecture or address sprang from his lips, but as the result of careful thought or tireless research. . . . He found relaxation in what to others would be severe mental effort; his very recreation took along with it, as its necessary accompaniment, large supplies of food for his mental activity. . . . His desire for absolute accuracy seemed to know no limitation in his demands for width of research; no exposition of a legal point could be safely attempted until all the decisions bearing thereon had been consulted. . . . Viewing the abundant fruit of his labors with an appreciation of his methods of production, his achievements can have resulted only from incessant toil."

Important Cases

As a lawyer Dr. Abbott held a high rank. As one of the counsel for Henry Ward Beecher in the suit brought against him by Theodore Tilton, he became widely known. He was also associated with the counsel for the government in the Guiteau Case, in which his advice was sought on the question of insanity and the practice in the selection of jurors.

A Lawyer's Lawyer

He was frequently consulted in matters of importance not only by clients, but by members of the legal profession. He attained the rare honor of being a lawyer's lawyer, one regarded by his fellow practitioners, to use the words of Mr. Alden, "as a specialist, whose services should be called in when the litigation seemed hopelessly *in extremis*. His correspondence with lawyers in difficulties was enormous; he often spoke of the fact that his counsel was generally sought upon forlorn hopes. He was a valued member of the national, state, and city bar associations, taking prominence in all movements that seemed destined to elevate professional standards; his services as a member of various committees on law reforms were always of the highest value."

The Briefs

Probably Dr. Abbott's fame as a legal author finds its surest basis in his admirable "Brief" books. These comprise his Civil Jury Trials, a new edition of which has just appeared; his Brief on the Facts, a revised edition of which will soon be issued; his Criminal Trial Brief and his Brief on the Pleadings.

These volumes were speedily recognized by the profession as the most useful, practical, and reliable guides to the safe conduct of any kind of case through the trial court. They have long ranked as "desk books" for the busy lawyer. The reason for their popularity is obvious. It was the thought of the author of this series to give the profession a group of books which would anticipate the requirements of counsel in the preparation or trial of a case. He knew what the working lawyer needed, and gave it to him.

AUSTIN ABBOTT, LL. D.

Law Professorship

In 1889 the University of the City of New York conferred upon him the degree of LL.D., and two years later called him to be dean of the University Law School, and conferred upon him the chair of pleading, equity, and evidence. His labors resulted in a greatly augmented reputation for the law school and a large increase in the number of students. This position he held until his death.

"Had his life been spared," says the writer from whom we have already quoted, "there is no doubt in the writer's mind that his fame as a legal educator would have equaled, if not surpassed, his fame as a legal author. He was deeply interested in his students, loved them as his boys, saw in them future leaders at the bar, in legislative halls, and in all the fields recruited from the law, understood and appreciated in a remarkable degree their crudities of conception and limitations of knowledge. He was very patient, deeply alive to possible pedagogical shortcomings, anxiously searching for suggestions from any source; his manner in the lecture chair was most genial and attractive; his lectures, graced occasionally with rich humor, breathed in their every line that respect for an admiration of the law with which he sought to inspire his students. He had, too, a grasp of his subjects which few could equal, supplemented by a terse, exact, yet plain and simple, method of expression, invaluable in the teacher of law."

The Inner Man

It is easy to recount the deeds of a man, and to point to those things which he achieved before the face of the world, but the boldest biographer may well hesitate in speaking of the soul life of another —of the "life hid with Christ in God." We should not venture to do so could we not quote Dr. Abbott's own words, which reflect his refined Christian spirit and deep piety. He was a member of the Broadway Tabernacle, and for over thirty years one of the deacons of that church. The following letter was written by Dr. Abbott to his pastor as a contribution to a prayer meeting from which he was necessarily absent:

My Dear Pastor:—

The subject you announced for Wednesday night, Favorite Passages of Scripture, reminded me of the words, "Thy rod and Thy staff they comfort me."

At my father's house in the country there is a little closet in the chimney corner where are kept the canes and walking sticks of several generations of our family. There is the venerable and

homely birch stick with which the great-grandfather used to ramble over his farm, and the ivory headed cane with which he always walked to "meeting." There is the gold-mounted cane that the granduncle flourished, and the ebony staff that I suppose some traveled friend brought from abroad years and years ago. There is a peeled stick which some serving man cut, and on which he wrought out with his penknife Pope's lines on the

"Happy man, whose wish and care a few paternal acres bound,
Content to breathe his native air on his own ground,"

and so on, and which, thus inscribed and decorated, he presented to his master as a token of affection. There is the granddaughter's alpenstock, brought home from Switzerland, and various samples of grotesque headed sticks made by the grandsons in the family workshop.

In my visits to the old home, when my father and I were going out for a walk, we often go to the cane closet and pick out our canes to suit the fancy of the occasion. In this I have frequently been reminded of the saying that the Word of God is a staff. How often have I selected from the armory of the Interpreter a text suited to the present exigency. During the war, when the seasons of discouragement and impending disaster were upon us, the verse, "He shall not be afraid of evil tidings, his heart is fixed trusting in the Lord," was a staff to walk with many dark days. When death took away our child and left us almost heartbroken, I found another staff in the promise that "though weeping may endure for a night, joy cometh in the morning." When, in impaired health, I was exiled for a year, not knowing whether I should be permitted to return to my home and work again, I took with me this staff, which never failed, "He knoweth the thought that He thinketh toward thee, thoughts of peace, and not of evil." In times of special danger or doubt, when human judgment has seemed to be set at naught, I have found it easy to go forward with this staff, "In quietness and confidence shall be your strength;" and in emergencies, when there has seemed to be no adequate time either for deliberation or action, I have never found that this staff has failed me, "He that believeth shall not make haste."

I wish that young men, instead of stumbling purposely, as so many do, over what seems to them repugnant or repulsive in the Scriptures, would choose daily from this armory a staff suited to the walk of the day, and they would soon come to possess many favorite, because helpful, passages in constant remembrances.

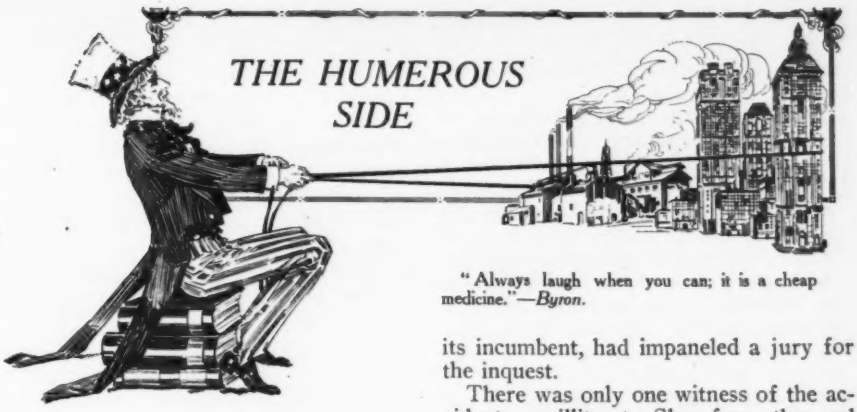
I fear I shall not be able to be present with you, and so I send you this as the contribution of

An Absent Member.

"Thy rod and thy staff they comfort me." This was his trust and consolation on that spring morning, sixteen years ago, when he was called upon to "walk through the valley of the shadow of death."

Lost with Titanic

George B. Goldschmidt, lost on the Titanic, was one of the oldest members of the New York Bar Association, having become a member in 1870. He was born in New York city in 1840 and admitted to practise in 1862, and was one of the best known conveyancers in this city.



"Always laugh when you can; it is a cheap medicine."—*Byron.*

Speed Logic. "Faster, Michael! If anything happens, Father will pay your fine."

"Yes, Miss Helen, but will he serve me time?"—Century Magazine.

Helping Out the Supply. Magistrate—So you admit having been engaged in making counterfeit money?

Prisoner—Yes, your Honor, and I thought it was all right. You see, the supply of the genuine article is so very, very short.

No Excuse. Judge William H. McSurely, of the superior court, told the following at a recent bar association dinner.

"One day when Judge Gary was trying a case he was much annoyed by a man in the back of the room who kept moving about, shifting chairs, and poking into corners. Finally the judge stopped the hearing and said: 'Young man, you are disturbing the court by the noise you are making. What excuse have you to offer for your conduct?'

" 'Why, Judge,' said the young man, 'I've lost my overcoat.'

" 'That's no excuse,' retorted the judge. 'People often lose whole suits in here without making half the disturbance.' "—Chicago Tribune.

A Profound Linguist. There had been a fatal accident at the railroad crossing in a little Pennsylvania town, and the coroner, a pompous old fellow, who magnified conscientiously both his office and its incumbent, had impaneled a jury for the inquest.

There was only one witness of the accident, an illiterate Slav from the coal mines, who could understand no English. With him the coroner began to struggle.

"Can you speak German?" he asked. The man shook his head.

"Can you speak Italian?" continued the official. Again the man shook his head.

"Can you speak Hungarian?" The same response.

"Can you speak Russian?" finally asked the coroner. Again the man shook his head.

"It's no use, gentlemen," said the coroner, turning to the jury. "We can't proceed with the case. I've spoken to this man in five different languages and can't make him understand me."—Philadelphia Record.

The Defenseless Policeman. City Editor: "This is a well-written article, but it can't be used; it's libelous."

Reporter: "Will it be all right if I 'hang' it on the policeman on the corner, downstairs?"

Terms. Prisoner—Yes, your Honor, I took the money. I needed the cash!

Judge—You wanted cash, eh? Well, we'll make it one off for thirty days! Next case!

Apropos. Apropos of Colonel Roosevelt's arguments for the recall of bad judges, a Chicagoan said the other day:

"I once heard Colonel Roosevelt tell a story about a frontier magistrate—a story that reminded him of a certain type of high court judge.

"The magistrate had in hand a hatchet-

stealing case. It was proved that the prisoner had stolen the hatchet, but the magistrate, search his law books as he would, could find no precedent for hatchet stealing.

" 'Prisoner at the bar,' he said at last, glaring up at the accused from over his spectacles, 'I can't locate nothing in the books relatin' to hatchet stealing, though I find here a case of ax stealing, where the defendant was convicted and got heavy punishment. Prisoner at the bar, you have had a narrow escape. You may now go, and let this be a warnin' to you.' "—Minneapolis Journal.

Small Target. The late Judge Gary, of Baltimore, who, in his younger days, was a member of the state legislature, was noted for his quickness at repartee. On one occasion he had introduced a bill that proved very obnoxious to several members of the opposing faction. After adjourning, one of the discontented came rushing up to him in a great state of excitement.

"Look here, Gary," he exclaimed, "I'd rather blow my brains out than advocate such a measure!"

"My dear sir," replied Gary, with a twinkle in his eye, "you flatter yourself on your marksmanship."

Immune. Justice Sir William Grantham, of the King's bench division, who has just died in London, was a good deal of a character. He was noted for what was regarded as too great freedom of speech in his judicial opinions.

A story about Sir William was that, after protesting vainly to a man who was smoking in a nonsmoking railway carriage, he sought to impress the offender by handing him his card, with a threat to have the man arrested at the next station. But the man left the compartment quickly when the train stopped, and took a seat in another compartment. Justice Grantham sent the guard to get the man's name and address so that he could be prosecuted. When the guard returned he said:

"I wouldn't have him arrested, sir. I asked his name and he gave me this card. You see, he is Mr. Justice Grantham, sir."—New York Sun.

A Missouri Horse Case. Speaker Champ Clark enjoys telling of an incident that occurred in a Circuit Court of Missouri during a "horse case," in which a horseman well known throughout the state for his expert knowledge was called as a witness, says the St. Louis Globe-Democrat.

"You saw this horse?" asked counsel for the defendant.

"Yes, sir, I—"

"What did you do?"

"I opened his mouth in order to ascertain how old he was, and I said to him, I said, 'Old fellow, I guess you're a good horse yet.' "

At this juncture opposing counsel leaped to his feet. "Your Honor," he cried, "I object to the statement of any conversation between the witness and the horse when the plaintiff was not present!"

Sub Rosa. Schuyler Colfax, son of the late vice president, and now by way of being something in the camera business, was once in politics in Indiana and achieved the distinction of being elected mayor of South Bend.

As mayor, part of his duty was to act as police judge. A town sot had been brought before him many times. Colfax had been lenient, but finally he sentenced the sot to jail until such time as he should have broken into sizes suitable for use on the road a big stone that was in the jail yard, even if it took thirty days.

The sot got a hammer and went at it. While he was working, a jailer dropped round to watch him.

"Say, Jim," said the sot, "what do you think of that squirt of a mayor of ours?"

"Oh, he's all right!"

"I know, but would it get back to him if I spoke me mind?"

"Nope. Go ahead."

"Well, I think he's got a fierce case of swelled head. Here he's sentenced me to break up in a month or so a rock that it took God Almighty three thousand years to make!"—Saturday Evening Post.